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IN THE

Supreme Court of the United States

October Term, 1962

No. 880

SLOAN'S MOVING & STORAGE CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF MISSOURI, E. D.

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
History of Proceedings	4
Statement	5
The Questions Are Substantial	7
Conclusion	21
Appendix A	22
Appendix B	35
Appendix C	37

CASES CITED

Alleghany Corp. v. Breswick & Co., 353 U. S. 151 (1957)	8, 16, 17
American Trucking Association v. United States, 355 U. S. 141 (1957)	19
Atchison T. & S. F. Ry. Co. v. United States, 295 U. S. 193 (1935)	8
Gilbertville Trucking Co., Inc., et al., v. United States, et al., 371 U. S. 115 (1962)	17
I. C. C. v. Inland Waterways Corp., 319 U. S. 671 (1943)	8
J. L. Querner, Extension—Frozen Foods, 62 M. C. C. 820 (1953)	14

PAGE

Kenosha Auto Transportation, 62 M. C. C. 824 (1954) 11

Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282 (1934) 8

M. J. Hannon—Control—Hannon Motor Lines, Inc., 39 M. C. C. 620 (1944) 16, 17, 18

Pan-American Airways Co. v. Civil Aeronautics Board, 121 F. 2d 810 (C. A. 2, 1941) 17

Pine Tree Transport, Inc., Extension—Frozen and Canned Fruit, 54 M. C. C. 669, 679 (1952) 11

Proctor & Gamble v. United States, 225 U. S. 282 (1912) 8

Railway Express Agency, Inc. v. United States, 205 F. Supp. 831 (D. C. S. D. N. Y., 1962) 15

Schwerman Trucking Co. of Texas, 80 M. C. C. 382 (1959) 16, 17

Standard Oil Co. (Indiana) v. United States, 282 U. S. 194 (1931) 8

United Parcel Service, Inc.—Common Carrier Application, 68 M. C. C. 199 (1956) aff'd Railway Express, Inc. v. U. S., 153 F. Supp. 738 (S. D. N. Y. 1957) aff'd per curiam 355 U. S. 270 (1960) 15

United Parcel Service of New York, Inc., 79 M. C. C. 629 (1960); 185 F. Supp. 96 (S. D. N. Y., 1960), aff'd per curiam 365 U. S. 566 (1960) .. 15, 17, 20

United States v. B. & O. R. Co., 293 U. S. 454 (1935) 8

PAGE

United States v. Capital Transit Company, 325 U. S. 357 (1945) 2

United States v. Detroit and Cleveland Navigation Company, 326 U. S. 236 (1945) 2

United States v. Marshall Transport, 322 U. S. 31, 88 L. ed. 1110 (1944) 8, 16, 17

United States v. Pierce Auto Freight Lines, 327 U. S. 515 (1946) 2

United States v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33 (1952) 2, 19

STATUTES CITED

Title 28 U. S. C. Section 1336 2

Title 28 U. S. C. Sections 2321-2325 2

Title 5 U. S. C. Section 1009 2

Title 28, U. S. C. Section 1253 2

Title 28 U. S. C. Section 2101(b) 2

Title 49 U. S. C. Sections 301, et seq. 3

Title 49 U. S. C. Section 5 ..... 3, 4, 16, 17, 18

Title 49 U. S. C. 307, Section 207(a) of the Interstate Commerce Act 4, 16, 17

Title 5 U. S. C. Sections 1007(b) and 1009(e), Sections 8(b) and 10(e) of the Administrative Procedure Act 4

Section 213 (Motor Carrier Act of 1935, Ch. 498, Section 213(a)(1) 49 Stat. 556) 16

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Appellant, Sloan's Moving & Storage Co., Inc. (herein called "Sloan's") appeals from the judgment of the United States District Court for the Eastern District of Missouri, entered on September 11, 1962, dismissing its complaint which sought to set aside a final order of the Interstate Commerce Commission (herein called the "Commission"), and respectfully submits this Statement to show that the Supreme Court of the United States

has jurisdiction of the appeal and that substantial questions are presented which merit review and decision by this Honorable Court.

Opinion Below

The opinion of the District Court is reported in 208 F. Supp. 567 (1962) and is annexed hereto as Appendix "A". The decision and order of the Commission (Division 1) dated October 27, 1961, which adopted the Examiner's Report and Recommended Order is annexed hereto as Appendix "B".

Jurisdiction

This suit was instituted under Title 28 U. S. C. Sections 1336, 2321-2325 and Title 5 U. S. C. Section 1009, to set aside an order of the Commission. The judgment of the District Court dismissing the complaint was entered on September 11, 1962, and a notice of appeal was filed on or about November 7, 1962.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952); *United States* v. *Capital Transit Company*, 325 U. S. 357 (1945); *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236 (1945); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515 (1946).

Questions Presented

There are three important questions presented by this appeal which involve the construction and administration of Part II of the Interstate Commerce Act (herein called the "Act") (49 U. S. C. Section 301, *et seq.*):

1. Where an application for operating authority covers a territory which embraces an area adequately served by existing carriers, may the Commission grant such authority merely because there was no proof of adequate service in the whole of the broader territory?

2. Where an application is made to serve a territory which embraces a smaller area adequately served by existing carriers, may the application be granted notwithstanding the evidence of adverse economic effect upon existing carriers?

3. Where in an application proceeding before the Commission the question of unlawful control within the meaning of Section 5 of the Act (Title 49 U. S. C. Section 5) is raised, may a new Certificate authorizing a new service be granted without a determination being made of the Section 5 issue and did the District Court err when it declined to review this issue on the ground that it was not formally raised in the proceedings before the Commission or is the Section 5 issue jurisdictional so that it cannot be waived?

There is, additionally, a vital public policy issue involved. If small independent carriers who provide concededly adequate service in a limited territory for which they hold a franchise can be driven out of business by large companies who employ as a technique of encirclement an application for a broad territorial area, the

National Transportation Policy will be subverted by a handful of carriers exercising oligopolistic power over rates, service and facilities.".

Statutes Involved

Sections 5(2), 5(4), 207(a) of the Act [49 U. S. C. Sections 5(2), 5(4) and 307] and Sections 8(b) and 10(e) of the Administrative Procedure Act [5 U. S. C. Sections 1007(b) and 1009(e)] which are set forth in Appendix "C" hereto are involved in this appeal.

History of Proceedings

On January 4, 1960, United Parcel Service, Inc. (herein called "United") a wholly owned subsidiary, of United Parcel Service of America, Inc., a Delaware corporation (herein called "Parent") applied for authority to conduct operations in interstate or foreign commerce, with certain exceptions, over irregular routes between all points and places in the States of Illinois, Indiana, Ohio and certain described portions of Wisconsin, Iowa and Missouri. The proposed authority was restricted, *inter alia*, to packages weighing not more than 50 pounds and not exceeding 108 inches in length and girth combined, each package to be considered a separate shipment and no more than 100 pounds to be transported from one consignor to one consignee in any one day.

The application was assigned for hearing, at which time the appellant and various motor carriers appeared as protestants. On or about April 26, 1961, the Examiner served his report and recommended that the application be granted, subject to certain limited restrictions.

Appellant and other motor carriers filed exceptions to the Examiner's Report and Recommended Order and thereafter Division 1 of the Commission, by its decision and order of October 27, 1961, adopted the Examiner's findings and directed the issuance of a Certificate. Acknowledging that appellant did render a satisfactory service in its area and was meeting the public's need for transportation service, the Commission nevertheless said:

> "Only a very small part of Sloan's overall traffic is exposed to diversion to applicant and such exposure is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce and in the St. Louis Commercial Zone. As seen, even with the authority recently granted, this carrier can only transport packages between St. Louis on the one hand, and, on the other, very limited areas in Missouri and Illinois. Because of the territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed. All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application" (p. 41 of the Examiner's Report).

Statement

A brief description of the parties and a summary review of the evidence presented before the Commission is submitted as a framework for consideration of the issues to be resolved by this Court.

(A) United holds a common carrier Certificate which authorizes the transportation of general commodities

from Chicago, Illinois to points and places in the States of Iowa, Michigan, Indiana, Illinois and Wisconsin. Additionally, United conducts exempt operations within the St. Louis Commercial Zone and operates in intrastate commerce within the State of Missouri. By the instant application, United sought to extend its authority to transport small packages in interstate commerce between all points in the States of Indiana, Illinois and Ohio, and described portions of the States of Wisconsin, Michigan, Iowa and Missouri.

The proposed service was represented to be speedier, more efficient and more economical than provided by United States parcel post and would be made available at comparable rates.

(B) Sloan's of St. Louis, Missouri, is authorized to provide an interstate common carrier parcel delivery service, restricted to parcels not exceeding 100 pounds between St. Louis, Missouri and a described area within the State of Illinois.

Sloan's physical operations, now completely blanketed by the Certificate granted to United, were and still are conducted at rates either equal to, or lower than, United's. The evidence of record showed that Sloan's service is identical with that which United proposed. The Commission did not find Sloan's service to be different from, or inferior to, United's.

At the time of the hearing, approximately sixty-five (65%) percent of Sloan's interstate business consisted of package freight and in a representative period of two weeks Sloan served 103 interstate points and more than ninety-eight (98%) percent of the packages transported weighed 50 pounds or less.

(C) Although United produced 190 so-called public witnesses, not one testified to a *bona fide* need for service into or out of Missouri which is not adequately provided by existing carriers. An analysis of the testimony in support of the application shows that United failed to prove one element of public convenience and necessity as required by Section 207 (49 U. S. C. Section 307). There was no complaint about truck service, except the vague charge that ordinary trucking rates are too high. This allegation was not directed against Sloan's since its rates are the equivalent of United's. Although there were bald assertions that a single shipper has shipments of parcels moving within and beyond Sloan's authorized territory, the true facts are that there was not a *scintilla of evidence* that the shipper requires the same carrier to service Sloan's territory and points beyond. Of the hundreds of shippers served by Sloan, only five purported "complaints" were noted and their nebulous and factitious character was recognized by the Commission when it omitted to discuss them.

The Court below, the Commission and United have relied upon the length of the Examiner's Report and the *caveat* that a Court ought not disturb the Commission's evaluation of the so-called factual evidence. But they cannot claim that there was substantial evidence of record to support the arbitrary conclusions reached. Indeed, the Commission could not, and did not, find that there was any deficiency of service or that there was a need for United's service to and from Missouri.

The Questions Are Substantial

This appeal presents substantial and important questions concerning the interpretation and application of Part II of the Act.

1. The Court below disregarded the statutory provisions relating to public convenience and necessity and the relevant decisional precedents when it held that a new Certificate may be issued notwithstanding that adequate service is available and existing facilities will be adversely affected. The Court also erred in approving the incorrect assignment, by the Commission, of the burden of proof to the protestants and treating the Commission's surmise and conjecture about future needs for service as ultimate facts when there was no substantial evidence of record to support these speculative findings.

2. The Court below placed an incorrect gloss upon this Court's decision in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957) and misread *United States* v. *Marshall Transport*, 322 U. S. 31 (1944). It is urgent, therefore, that this Court announce, in a definitive way, whether or not Section 5 of the act is jurisdictional (Appendix "A", pp. 31-33).

I

Concededly, when there is a "rational basis for the conclusions approved by the administrative body", the judicial function is exhausted. [*Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286 (1934); *I. C. C. v. Inland Waterways Corp.*, 319 U. S. 671 (1943); *Proctor & Gamble* v. *United States*, 225 U. S. 282 (1912).] Conversely, if the findings of an administrative agency are arbitrary or if the evidence is palpably insubstantial or if essential basic findings are omitted, the conclusions reached by the agency cannot stand. [*United States* v. *B & O. R. Co.*, 293 U. S. 454 (1935); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Standard Oil Co. (Indiana)* v. *United States*, 282 U. S. 194 (1931).]

1. In this case, the Commission committed one error which, standing alone, warrants relief from its order.

Simply stated, the Commission violated the statutory mandate when it imposed upon Sloan's the burden of proof that the public convenience and necessity did not require the proposed service:

> "All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant partial denial of the application" (p. 41 of the Examiner's Report).

Although the District Court recognized that the burden of proof was upon United, it sought to rationalize the Commission's error by asserting that:

> "Sloan bases its contention upon the isolated statement in the Examiner's report ending * * * This sentence is part of the excerpt of the Examiner's report set out in Division I. The sentence says nothing expressly about burden of proof. When this sentence is read in context and in the light of the report as a whole, it is perfectly clear that the burden of proof is not placed upon Sloan. It would appear that the examiner was merely saying in substance that the evidence offered by Sloan did not overcome the showing made by UPS upon the existence of a need for its service" (Appendix A, p. 29).

This was not an "isolated" statement; it was the essence of the applicant's case and the only basis for the Commission's order and this explains why the Commission disregarded the utter lack of proof of public convenience and necessity by United.

The District Court was probing the Examiner's mind when the language was clear and explicit and did not

require interpretation. Indeed, the Examiner's statement makes no reference to the evidence adduced by United because he assumed, as did the Commission, that Sloan's had the negative burden of disproving what United had to prove affirmatively.

2. The Court incorrectly suggests that Sloan's relied primarily upon the "adequacy of its service" as a bar to the issuance of additional operating authority. Sloan's did not and does not urge that adequacy of existing service is an absolute bar to a grant of new authority or that it has a vested right to be immunized against competition. But adequacy of service is very much in issue here, since the Commission granted authority to United because it incorrectly concluded that Sloan's service was inadequate for the whole territory involved, and then based its Order upon this very element.

Thus, by finding that "because of territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed" (p. 41 of the Examiner's Report), the Commission made adequacy of service a seminal issue. Hence, if there was no factual basis for the Commission's finding that Sloan's service was inadequate, the order and the judgment below must be vacated. The fact is that there was not an iota of proof of a public need for one carrier to provide service in *Sloan's territory and beyond it*. Not one witness showed or testified to a need for a single carrier to handle shipments in every segment of the territory applied for by United.

The inability of Sloan's to serve an area beyond its franchised territory does not prove a public need for the alleged service offered by United within Sloan's territory; and the fact that a shipper may occasionally require service beyond Sloan's territory does not prove

that service is required, from the same carrier, in Sloan's authorized territory. Even if it were true that "witnesses from every portion of this territory beyond Missouri gave evidence that they shipped parcel post packages every week to Missouri" and from Missouri's points to points "beyond the area served by Sloan's", this does not, and cannot, justify a need for United's service within Sloan's territory. Since there is no finding that within its territory Sloan's cannot fulfill the public's need, the order was erroneous.

The issue is not whether Sloan's can serve the broad territory which United described in its application but whether service is adequate within Sloan's territory and whether Sloan's is entitled to protection against aggressive competition for which no public need was shown. The Commission cannot arbitrarily discard the rule which instructs that when a carrier satisfactorily serves a portion of the proposed territory in single line service and can serve the rest of the territory by an interline arrangement, an application for a new service must be denied. Direct single line service is not, and never has been, the test of public convenience and necessity:

> "The shipper is not entitled as a matter of right to direct motor carrier service to every point to which it ships when reasonably adequate interline service is available. Existing carriers have substantial investments in operating rights, facilities, and equipment necessary to institute and sustain their operations, and they are entitled to all the traffic they can handle adequately, and economically in the territories which they serve without the competition of an additional service." *Pine Tree Transport, Inc., Extension—Frozen and Canned Fruit*, 54 M. C. C. 669, 675 (1952). [Compare Kenosha Auto Transportation, 62 M. C. C. 824 (1954).]

In the absence of any evidence that an interline arrangement afforded by Sloan's has been utilized and found deficient, the Commission could not rationally find that "Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed". Since this was the only alleged deficiency in Sloan's available service, the Commission's findings must be rejected. Furthermore, United failed to show that the services of existing carriers did not meet the reasonable transportation requirements of the shipping public.

Assuming, *arguendo*, that there was a need for service beyond Sloan's territory, the Commission could have granted a part of the authority and excluded therefrom the territory now served by Sloan's and others. In hundreds, indeed thousands of cases, a part of an application has been denied where the Commission has found that a particular area, embraced within the larger territory applied for, is adequately served. There are hundreds of carriers who have limited territorial grants of authority and the Commission has denied applications where these territories are subject to invasion by applicants who seek authority to serve the same and additional territory.

3. Compounding the District Court's erroneous analysis of the evidence is its statement that:

> "While the evidence as to the extent of the likely diversion of Sloan's small parcel business by the proposed UPS service is conflicting, we cannot say that the Commission failed to give this aspect of the case full consideration". (Appendix "A" p. 27).

The short answer is that if the "complete" territorial service which United proposed was required by the public then it is obvious that shippers will, in fact, divert business

from Sloan's and the Commission's conclusion that only "a small part of Sloan's overall traffic is exposed to diversion" is absurd. On the other hand, if there will be no diversion from Sloan's, it must follow that there is no need for United's service in Sloan's territory.

Of course, the Commission was obliged to acknowledge that the protestants' traffic (and particularly Sloan's) is exposed to diversion. Whether the amount of traffic which is subject to diversion is large or small is irrelevant. The Commission has uniformly ruled that all segments of a carrier's traffic are vital and this is particularly true with respect to package freight which, as United's witness admitted, can only be successfully handled if a large volume is available. Obviously, a carrier with extensive authority has a decided competitive advantage and for that reason the Commission has always held that a shipper has no right to single line service. In these circumstances, the Commission is charged with the obligation to protect the traffic of small but active carriers which in this case it utterly failed to do.

Shippers who may require service within and beyond Sloan's territory are not likely to split up their traffic between two carriers and this traffic must ultimately be captured by United. Speculation by the Commission about Sloan's ability to compete with United in the exempt area is not only incorrect but idle.

> "It is well established that an existing carrier generally should have the right to transport all the traffic it can handle adequately and efficiently in the territory it is authorized to serve, without the added competition of a new operator" (*Law & Ingham Transportation Co. Inc., Extension*, 13 Federal Carrier Case (C. C. H.) Par. 34,788 (1957)).

In *J. L. Querner, Extension—Frozen Foods*, 62 M. C. C. 820 (1953), the Commission stated:

> "The creation of the proposed new operation and service would merely permit applicant to divert traffic now being handled by other carriers in reasonably satisfactory manner. The public interest requires that carriers already in the territories involved be protected from an invasion of such territories by a new carrier in the circumstances here present."

Moreover, many parcel delivery companies in St. Louis have gone bankrupt because of their inability to withstand increased competition. And the record showed that where Sloan's and United were direct competitors, the former's package traffic was radically reduced, forcing Sloan's to rely upon a declining retail business for survival. Now the Commission adds the last straw and this violates the elementary rule that when a carrier has expanded its resources and facilities to handle all available traffic, it is entitled to protection against a new competitive service not only for its own survival, but because stability and sound economic conditions in the industry dictate this course.

The District Court's finding that "* * * we cannot say that the Commission failed to give this aspect of the case full consideration" (Appendix A, p. 27) is not only irrelevant but wrong. The issue is not whether consideration of the issue was given by the Commission, but rather whether the Commission's conclusions are supported by substantial evidence of record. Surely, a conclusion predicated on speculation that the diversion will not be great, does not sanction Court approval particularly when the surmise is unfounded.

4. The District Court made reference to the decision in *Railway Express Agency, Inc. v. United States*, 205 F. Supp. 831 (D. C. S. D. N. Y., 1962), where the validity of the subject Certificate was upheld. The fact is, however, that aside from the irregular-regular route issue, none of the issues presented to the District Court were the subject of the *Railway* case. Accordingly, reference to that decision was unwarranted. So, too, the fact that various United companies have been authorized by the Commission to establish a parcel delivery service similar to that here proposed in different areas of the country is irrelevant (*e.g., United Parcel Service, Inc.—Common Carrier Application*, 68 M. C. C. 199 (1956) aff'd *Railway Express, Inc. v. U. S.*, 153 F. Supp. 738 (S. D. N. Y. 1957) aff'd *per curiam*, 355 U. S. 270 (1960); *United Parcel Service of New York, Inc.*, 79 M. C. C. 629 (1960); 185 F. Supp. 96 (D. C. S. D. N. Y. 1960), aff'd *per curiam*, 365 U. S. 566 (1960)].

Earlier cases are easily distinguishable. In those cases, the Commission found that: (a) motor common carriers did not regularly provide parcel delivery service or embargoed such traffic; (b) motor common carriers who provided parcel delivery service did so at high minimum rate charges; (c) motor common carriers did not establish specialized methods and techniques for handling small parcel traffic; and (d) shippers complained of inadequate service. Here, however, the applicant was opposed by a carrier who provides, at comparable rates, the identical service proposed by United or one of its affiliates.

5. The District Court committed reversible error when it held "Sloan's contention that Section 5 limits the Commission's jurisdiction to grant a certificate under Section 307 without merit" (Appendix A, p. 33). That

the Court incorrectly treated Section 5 and Section 207, as unrelated provisions of the Interstate Commerce Act is made self-evident by the legislative history of the statute and the decisional precedents. At the very outset of the regulation of interstate motor carriers, there was a provision similar to Section 5, namely, Section 213 (Motor Carrier Act of 1935, Ch. 498, Section 213(a) (1), 49 Stat. 556). Section 213 was subsequently repealed by the Transportation Act of 1940 (Ch. 722, Title 1, Section 21(e), 54 Stat. 924), and Section 5 of Part I of the Act was incorporated into Part II. Hence, no franchise may be granted to one who fails to comply with Section 5 of the Act since such default is inconsistent with a finding of fitness required under Section 207 (Appendix C, p. 39). Indeed, it is fundamental that the Commission cannot and will not approve a common carrier application if there is a violation of Section 5(4) of the Act. [*M. J. Hannon-Control-Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944); *Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959)]. In *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944), this Court held that the Commission could not proceed with, much less grant, an application which involves an unapproved control relationship otherwise subject to Section 5 of the Act.

The *Marshall* doctrine was not attenuated by this Court's decision in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151 (1957). Contrary to the District Court's construction, Section 5 is jurisdictional and the Commission may not approve applications where a controlling carrier or non-carrier is not party to a control application. While it is true that Section 5 is "not strictly jurisdictional in the sense that if the Commission wrongly decides" that A does not control B which seeks to control C that "the Commission loses jurisdiction over B, the power to regulate B" (*Alleghany Corporation* v. *Breswick & Co.*,

supra, at pp. 171-172), this means only that if the Commission reaches a wrong decision exculpating a person or corporation from regulation under Section 5, it does not foreclose the later assertion of jurisdiction by the Commission. The very illustration provided in the *Alleghany* case, *supra*, exposes the egregious error of interpretation committed by the District Court [*Gilbertville Trucking Co. Inc., et al.* v. *United States, et al.*, 371 U. S. 115 (1962)].

Neither the precedent in *Yale Transport Corp.* v. *United States, supra*, nor the decision in *Pan-American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, (C. A. 2, 1941), suggest that Section 5 is not applicable in this case. In the *Pan-American Airways Co.* case, *supra*, the Court of Appeals decided that a control application (under Section 408(a) of the Civil Aeronautics Act) is required where a subsidiary becomes an air carrier by reason of an application for a Certificate but it then concluded that the Certificate could not be withheld pending the processing of a Section 408 application. The subsequent Supreme Court decision in *Marshall*, *supra*, and the subsequent *Schwerman* decision, *supra*, shows that the Commission is without authority to issue new operating authority to a motor carrier unless a previously unapproved control relationship is sanctioned. In *Schwerman*, *supra*, the Commission refused to issue a permit until a Section 5 application was filed and approved and the Commission was then aware of the decision in *Pan-American Airways Co.*, *supra*, as the report in the *Hannon* case, *supra*, shows:

> "It is apparent that without approval under Section 5(2) to control the two motor carriers, Hannon would immediately be in violation of the specific prohibition of section 5(4) upon his exercise of the authority granted under Section 209.

> The words 'or otherwise' appearing in Section 5(2) are broad enough to encompass what Hannon proposes as a permissively lawful transaction thereunder, and which we are empowered to approve if we find it to be consistent with the public interest. Compare Pan American Airways Co. v. Civil Aeronautics Board, 121 Fed. (2d) 810 (p. 622)."

A brief description of the "United family" discloses the Section 5 violation.

United is part of a complex of many companies. At the apex of a vast pyramid is United Parcel Service of America Inc., the Parent, a Delaware corporation which owns all of the issued and outstanding stock of four classes of motor carirers: (a) companies which were engaged in contract carriage prior to 1935, and therefore, were granted so called "grandfather" permits; (b) a carrier who secured authority after 1935; (c) a non-carrier which by an acquisition proceeding under Section 5 acquired operating authority subsequent to 1935, and (d) contract carriers including United which acquired common carrier authority since 1935.

(a) *United* which holds a permit issued under the "grandfather" clause; a Certificate issued in 1957; and the Certificate which is the subject matter of this suit.

(b) *United Parcel Service of New York, Inc.,* which holds a contract carrier Permit No. MC-63063 issued in 1953 and a common carrier certificate granted by the Commission in 1960.

(c) *United Parcel Service of Pennsylvania, Inc.*, which holds Contract Carrier Permit No. MC-89529, issued in 1940 under Section 209 of the Act (49 U. S. C. Section 309). Extensions of this contract carrier authority were obtained on October 5, 1951, April 25, 1951 and on June

18, 1955. At no time was a Section 5 application filed seeking the Commission's approval of the Parent's control over this company.

(d) *United Parcel Service of America, Inc.*, (a Nevada corporation), a non-carrier which owns all of the stock of United Parcel Service of Portland. The latter acquired the contract carrier operating rights (Permit No. MC-35480) of A. J. Wiese on October 20, 1941. The parent corporation was not a party to this application and accordingly, the Commission has never approved this control relationship.

The District Court suggests that the unlawful control issue was not properly raised before the Commission. Aside from the fact that the issue was presented during the course of the hearing (Tr. 468-469) and that the Commission knew about the control relationships within the United family, it was United's affirmative statutory obligation to seek Commission approval of the control relationships. Failing such application and approval, the Commission lacked jurisdiction to grant the Certificate. In summary, even if the issue was not raised, the Commission could not lawfully issue a Certificate. Accordingly, the District Court's reliance upon this Court's decision in *U. S. v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952), is misplaced.

The District Court's reliance upon *American Trucking Association v. United States*, 355 U. S. 141 (1957) (Appendix "A", p. 32), to support a conclusion that Section 5 is not applicable to a Section 207 proceeding is misplaced. Only in the limited situation where a railroad motor carrier subsidiary establishes "special circumstances" may the applicant be granted unrestricted motor carrier authority despite the prohibitions of Section 5.

However, this Court did say in the cited case (pp. 151-152):

> "the underlying policy of §5(2)(b) must not be divorced from proceedings for new certificates under §207."

Moreover, the portion of this Court's opinion in *American, supra,* which was relied upon by the District Court concerned the legislative history of Section 5(2)(b), which is obviously not at issue.

It cannot now be argued that the Section 5(4) violation in this case was "technical" and that it would be unfair to penalize the applicant for a *bona fide* error concerning the applicability of Section 5 of the Act. Concededly, the Section 5 issue was presented to the United States District Court for the Southern District of New York in *Yale Transport Corp.* v. *United States, supra,* and was rejected by that Court. On appeal, the United States Supreme Court affirmed the decision of the United States District Court (Mr. Justice Black "dissenting") and a petition for rehearing was denied by the Supreme Court [369 U. S. 566 (1961), 366 U. S. 947 (1961)]. But the circumstances here are different because United was forewarned of this issue when the instant case was pending before the Commission. Hence this is not an instance of retroactive application of the statute which will deprive United's Parent or any of the subsidiary motor carriers of any rights which they obtained from the Commission. There is no demand here that the Commission set aside past consummated transactions. Sloan's asks only that there be compliance now and that the illegal relationship be cured before any application is granted.

Conclusion

It is respectfully submitted that the decision of the District Court fails to recognize that the Commission may not approve an application if an illegal control relationship exists; that public convenience and necessity was not established in this case; and that the Commission may not grant a Certificate unless the order is bottomed upon basic findings supported by substantial evidence.

Appellant believes that the questions presented by this appeal are substantial and of importance not only to the public generally, but to the Commission and those who are regulated by, and are subject to the jurisdiction of that agency.

Respectfully submitted,

HERBERT BURSTEIN and G. F. GUNN, JR.,
Attorneys for Sloan's Moving & Storage Co., Inc.

February 27, 1963.

Appendix A

Opinion of United States District Court for the Eastern District of Missouri

VAN OOSTERHOUT, Circuit Judge.

Sloan's Moving & Storage Co., Inc. (hereinafter called Sloan) brings this action against the United States and the Interstate Commerce Commission to set aside and annul in whole or in part the order of the Commission, dated October 27, 1961, in MC-115495 (Sub. No. 3) granting the application of United Parcel Service, Inc. (hereinafter called UPS) for a Certificate of Public Convenience and Necessity authorizing UPS to operate as a common carrier by motor vehicle of small parcels over irregular routes.

The nature of the transportation service applied for and granted is described in detail in the Commission's order. Briefly summarized, UPS sought authority to transport packages (excluding certain specified types) weighing not more than 50 pounds and not exceeding 108 inches in length and girth combined, between all points in the states of Illinois, Indiana and Ohio, and in specified portions of the states of Missouri, Michigan, Wisconsin and Iowa, except that no service would be afforded for delivery between retail stores and their branches or warehouses or between retail stores and their customers. At the hearing a further restriction was added that not more than 100 pounds of packages from one consignor at one location to one consignee at one location would be accepted on any one day. The parties are completely familiar with the nature and characteristics of the proposed UPS service and such service is similar to that described in some detail in Yale Transport Corp. v.

United States, D. C. S. D. N. Y., 185 F. Supp. 96, affirmed per curiam 365 U. S. 566, 81 S. Ct. 754, 5 L. Ed. 2d 806.

Jurisdiction of this court is invoked under 28 U. S. C. A. §§1336, 2321-2325, and 5 U. S. C. A. §1009. This three-judge court, constituted as required by 28 U. S. C. A. §2284, has convened for the purpose of hearing and determining this case.

UPS was permitted to intervene as an additional defendant. By stipulation of counsel for all parties and order of this court, this case was set for hearing on July 19, 1962, on the issue of Sloan's right to the permanent injunction prayed for in its complaint. The case was reached for hearing on July 19, 1962. A certified copy of the records of the proceedings before the Commission, including the evidence introduced, the exhibits, the report of the examiner, and all orders of the Commission were received in evidence. Counsel for all parties filed timely written briefs and orally argued the case, whereupon the case was submitted and taken under advisement.

Sloan urges that it is entitled to have the challenged certificate issued to UPS declared null and void in whole or in part, for the following reasons:

"Point I.

"There is no evidence that the present and future public convenience and necessity requires United's service and the findings made by the Examiner were not supported by substantial evidence."

"Point II.

"The Commission incorrectly imposed the burden of proof upon the protestants."

"Point III.

"The Commission departed from the decisional precedents in granting United irregular route operating authority."

"Point IV.

"The certificate should not have been issued to United because there was a violation of Section 5 of the Interstate Commerce Act."

"Point V.

"There will be dual operations directly in violation of Section 210 of the Interstate Commerce Act, Part II."

Such points will be considered in the order stated.

I.

[1] Sloan challenges the sufficiency of the evidence to support the Commission's finding that present and future public convenience and necessity requires UPS' proposed service. The findings relating to UPS' ability, willingness and fitness to perform the service are not challenged. The rules relating to the scope of judicial review of the Commission's findings are well established and are not in dispute. The Interstate Commerce Act in general, and §207 thereof—49 U. S. C. A. §307[1]—in particular, give the Commission a broad grant of authority to pass upon present and future public convenience and necessity. Orders

[1] In referring to the provisions of the Interstate Commerce Act, we will use the section numbering as found in 49 U. S. C. and 49 U. S. C. A.

of the Commission based upon adequate findings and supported by substantial evidence cannot be upset. United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 535-536, 66 S. Ct. 687, 90 L. Ed. 821; Convoy Co. v. United States, D. C. Ore., 200 F. Supp. 10, 12-13.

In Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 286-287, 54 S. Ct. 692, 693, 78 L. Ed. 1260, the court states: "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

UPS' application was heard by Hearing Examiner Lawrence A. Van Dyke, Jr. After hearing 193 public witnesses, the calling of public witnesses was discontinued by the examiner upon the basis that additional testimony by such witnesses would be only cumulative. The record consists of 6391 pages and 402 exhibits. The examiner, in a 48 page report, makes a detailed analysis of the evidence, makes findings, discusses the legal issues, and makes a determination that the present and future public convenience and necessity require the operation proposed by UPS. Sloan, among others, participated in the hearing and filed exceptions to the examiner's report. The Commission, after due consideration, found the exceptions filed to be without merit and approved, affirmed and adopted the examiner's statement of facts, conclusions and findings, and authorized the issuance of the certificate as recommended by the examiner. Petition for reconsideration was denied on December 7, 1961. The certificate authorized by the order was issued to UPS on January 18, 1962.

Sloan, although conceding that the examiner made the essential ultimate findings in statutory language, urges, "In this case, there is no rational support, in terms of adequate basic findings, for the conclusions which the

Examiner cast in statutory language. The fact is that the basic findings which were made were not supported by substantial evidence of record."

[2] Sloan stresses that there is no express finding of inadequacy of the existing service. Sloan concedes that the absence of such finding does not invalidate an order of the Commission. See Convoy Co. v. United States, supra; A. B. & C. Motor Transp. Co. v. United States, D. C. Mass., 69 F. Supp. 166, 169.

Sloan argues "the fact that a finding of inadequacy is not required, does not justify a new Certificate when service within a given territory is adequate and the Commission cannot disregard the existence of adequate service." It would seem obvious that if a finding of inadequacy of service is not required, evidence to support such a finding should not be a prerequisite to the Commission's right to grant the certificate. 49 U. S. C. A. §307 expressly provides that the issuance of a certificate does not confer any proprietary interest in the use of the public highways upon the certificate holder. Doubtless the adequacy of existing service is a factor which the Commission should consider in determining whether any authority should be granted. The record before us reflects the examiner and the Commission gave full consideration to the available existing service.

Sloan also complains about the examiner's determination that Sloan's business would not be seriously adversely affected. The examiner's report includes the following:

> "Sloan's is engaged in the household moving and storage business, general hauling, and parcel delivery service. In 1959 carrier had operating revenues of $948,592; of which about 50 percent was

obtained from its parcel delivery business. A survey during a 10-day period from June 20 through July 1, 1960, disclosed that 25,878 packages were transported in both intrastate and interstate commerce, of which only 3,594, or about 14 percent of all packages surveyed, were transported in interstate commerce in the wholesale type of service proposed herein. Only a very small part of Sloan's overall traffic is exposed to diversion to applicant and such exposure is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce and in the St. Louis Commercial Zone. As seen, even with the authority recently granted, this carrier can only transport packages between St. Louis, on the one hand, and, on the other, very limited areas in Missouri and Illinois. Because of the territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed. All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application."

While the evidence as to the extent of the likely diversion of Sloan's small parcel business by the proposed UPS service is conflicting, we cannot say that the Commission failed to give this aspect of the case full consideration.

Sloan's territory extended only approximately 75 miles out from St. Louis. UPS proposed to furnish direct service to a much larger territory. There is substantial evidence to the effect that much of UPS' contemplated business would be derived from shippers using parcel post service which service they found to be unsatisfactory.

In disposing of a similar contention, the court in the Yale Transport case, supra, states:

> "Of course, no two cases of this sort are exactly alike and the present record does appear to contain a more impressive showing of the service being offered by presently certificated carriers than did that in the Chicago case. [68 M. C. C. 199] Nevertheless, any differences in the evidence as to the value of UPS' service, the availability of other service, and diversion, are not sufficient to take the case out of the area committed to the Commission's judgment." 185 F. Supp. 101.

The validity of the certificate here under attack was upheld in Railway Express Agency, Inc. v. United States, D. C. S. D. N. Y., 205 F. Supp. 831. In that case, the certificate here involved was attacked by Railway Express Agency (hereinafter called REA). Sloan was not a party to that case and is not bound by the result. There are also factual differences between Sloan's position and that of REA. In the cited case, competition existed in a much larger geographical area. Nevertheless, said decision substantially supports the Commission's determination on the public convenience and necessity issue.

[3] We cannot, within the proper limits of an opinion, adequately discuss all the extensive materjal evidence bearing upon public convenience and necessity. Our examination of the record satisfies us that the essential findings made by the examiner and adopted by the Commission are supported by substantial evidence and that such findings support the Commission's order authorizing the certificate.

II.

[4] Sloan asserts that the Commission erroneously placed the burden of proof upon it to establish that present and future public convenience and necessity does not require the proposed service. We fully agree with Sloan's view that the burden of proof rests upon the applicant to establish public convenience and necessity. We are satisfied that the decision of the examiner and the Commission was not induced by any erroneous view of the law relating to burden of proof. Sloan bases its contention upon the isolated statement in the examiner's report reading, "All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application." This sentence is a part of the excerpt of the examiner's report set out in Division I. The sentence says nothing expressly about burden of proof. When this sentence is read in context and in the light of the report as a whole, it is perfectly clear that the burden of proof is not placed upon Sloan. It would appear that the examiner was merely saying in substance that the evidence offered by Sloan did not overcome the showing made by UPS upon the existence of a need for its service.

III.

[5] We find no basis for reversal in Sloan's contention that the Commission departed from its decisional precedents in granting UPS irregular route operating authority. It is by no means certain that the Commission departed from its precedents. In any event, a court on review is not concerned with the consistency or inconsistency of the Commission's decisions. Virginian Ry. Co. v. United States, 272 U. S. 658, 665-666, 47 S. Ct. 222,

71 L. Ed. 463; Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271, 46 S. Ct. 500, 70 L. Ed. 941; Ace Lines, Inc. v. United States, D. C. S. D. Iowa, 197 F. Supp. 591, 599.

[6] More importantly, substantially the same issue was raised by REA in its attack upon the identical certificate here involved in Railway Express Agency, Inc. v. United States, supra. Judge Friendly in that case adequately demonstrates that the Commission acted within its statutory authority and committed no error in issuing the certificate here before us. Among other things, he states:

> "However, we read §208 of the Motor Carrier Act as authorizing but not requiring the Commission to limit a freight carrier to 'specified routes'; it says, quite specifically, that if operations are 'not over specified routes or between fixed termini', it is enough for the Commission to name 'the territory within which, the motor carrier is authorized to operate.'
>
> * * * * * *
>
> "The Commission, and the industry, knew what service UPS proposed, and the Commission, in granting the application, must have intended to issue a certificate permitting what UPS had asked and for which, as the Commission found, it had proved public convenience and necessity and fitness, willingness and ability. So far as the statute goes, the Commission could have issued a certificate permitting exactly that and saying nothing more; if it chose to baptize the document with a title from its catalogue which it thought closest to being apt, no legal rights of REA are violated if the fit be not altogether precise." 205 F. Supp. 836, 837, 838.

IV.

[7] Sloan asserts that United Parcel Service of America, Inc., the parent corporation which owns all of the stock of UPS, and other carriers in the United Parcel Service family, should all have been made parties in the instant application and that the Commission's approval of the corporate control membership involved should have been sought pursuant to 49 U. S. C. A. §5(2), and that the failure so to do is a bar to the issuance of the certificate here under attack. We agree with the contention of the Commission and UPS that the unlawful control issue was not adequately raised before the examiner or the Commission by appropriate pleading, briefs, exceptions or otherwise. All that Sloan's reference to the raising of this issue shows is that Sloan's counsel started to question a UPS witness as to whether §5 proceedings had been instituted, whereupon UPS counsel conceded that the parent corporation had not filed a §5 application. Discussion between counsel revealed that the violation of §5 was in issue in the Yale Transport case, supra, whereupon Sloan's counsel stated, "Depending upon the outcome of that case, the issue might become more or less material in this case." Neither the examiner nor the Commission discussed the unlawful control issue. In United States v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33, 37, 73 S. Ct. 67, 69, 97 L. Ed. 54, the court states:

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

See Southern Kansas Greyhound Lines, Inc. v. United States, D. C. W. D. Mo., 134 F. Supp. 502, 510-511.

[8] We are satisfied that the unlawful control issue was not properly raised before the Commission and hence we decline to consider such issue except to the limited extent of determining Sloan's contention that the Commission lacked jurisdiction to grant the certificate. Sloan contends that conformity with §5 relating to control proceedings is a prerequisite to the granting of a certificate under §307. This argument is premised on the words of §307 requiring the applicant "to conform to the provisions of this chapter." Section 307 is part of Part II of the Interstate Commerce Act and likewise a part of Chapter 8. Section 5 is found in Part I of the Act and in Chapter 1. Obviously §5 is not a part of the division or chapter containing §307. Thus, it is clear §307 does not specifically require an applicant under §307 to conform to §5, nor can such requirement be fairly implied.

In American Trucking Ass'ns, Inc. v. United States, 355 U. S. 141, 78 S. Ct. 165, 2 L. Ed. 2d 158 plaintiff, a rail owned carrier, was unable to obtain approval under §5(2) (b). Plaintiff then sought a certificate under §307, which certificate was granted and upheld. The Supreme Court, in holding that §5 does not limit §307, states:

> "The legislative history of the Motor Carrier Act of 1935 gives no indication that §213(a) (1), the predecessor of §5(2) (b), was to be considered a limitation on applications under §207.
>
> * * * * * *
>
> "In interpreting §207, the Commission has accepted the policy of §5(2) (b) as a guiding light, not as a rigid limitation.
>
> * * * * * *

> "We conclude, therefore, that the Congress did not intend the rigid requirement of §5(2) (b) to be considered as a limitation on certificates under §207 [49 U. S. C. A. §307.]."

We hold that Sloan's contention that §5 limits the Commission's jurisdiction to grant a certificate under §307 is without merit.

Inasmuch as we have held that the unlawful control issue to the extent that it goes beyond the jurisdictional issue is not properly before us, we express no opinion thereon. But see Yale Transport Corp. v. United States, supra, and Yale Transport Corp. v. United Parcel Service, MC-F-7321 (dismissing the §5(7) proceedings).

V.

[9] Sloan's attack upon the certificate upon the ground that the dual operation it authorizes violates 49 U. S. C. A. §310 is without merit. It is true that UPS served as a contract carrier for retail delivery service to a limited extent in Cincinnati. The Commission recognized this situation and gave it full consideration. It imposed conditions and reserved the right to impose additional conditions to protect the public interest and guard against any discrimination that might result from dual operation.

Title 49 U. S. C. A. §310, relating to dual operation, permits the Commission, for good cause shown upon a finding that both contract and common carrier service may be held consistently with the public interest and in the national transportation policy, to authorize dual operation. The appropriate finding, backed by evidentiary support, was here made. The situation and the conditions here imposed resemble closely those existing in Yale Transport, supra, where the dual operation was approved.

We conclude that there was a factual and legal basis for the Commission's order and the certificate issued pursuant thereto, that Sloan has not demonstrated that the Commission committed any error in issuing the certificate, and that accordingly Sloan's complaint must be dismissed.

This memorandum opinion shall constitute the court's findings of fact and conclusions of law, pursuant to the provisions of Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A.

IT IS ORDERED AND ADJUDGED that the relief prayed for in the complaint be denied and that the complaint be and it is hereby dismissed.

Appendix B

DECISION AND ORDER

Service Date
November 8, 1961

At a Session of the Interstate Commerce Commission, Division 1, *Commissioners Walrath, Webb and Tucker*, (Commissioner Walrath did not participate) held at its office in Washington, D. C., on the 27th day of October, A. D. 1961.

No. MC-115495 (Sub-No. 3)

UNITED PARCEL SERVICE, INC., EXTENSION—
MIDWESTERN STATES
(Cincinnati, Ohio)

Upon consideration of the application and record in the above-entitled proceeding, including the examiner's report and recommended order, the exceptions filed thereto by Railway Express Agency, Inc., and jointly by Orscheln Bros. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Sloan's Moving and Storage Co., Inc., and applicant's reply, and

It appearing, That the exceptions and reply raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Division 1 discussing the evidence in the light of such pleadings;

And it further appearing, That the examiner recommended the granting to applicant of a certificate of public convenience and necessity, authorizing the operations described in the appendix hereto;

Wherefore, and good cause appearing therefor:

We find, That the exceptions filed herein are without merit; and that the statement of facts, the conclusions and the findings of the examiner being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the said application for a certificate, except to the extent granted in said report, be, and it is hereby, denied.

It is further ordered, That upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, within the time specified in the next succeeding paragraph, an appropriate certificate will be issued.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. McCOY
Secretary

(Seal)

Appendix C

INTERSTATE COMMERCE ACT:

Section 5 (49 U. S. C. Section 5):

"(2) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or for a carrier by railroad to acquire trackage rights over, a joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed

transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

* * * * *

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control, or management in a common interest of any two or more carriers, however such result

is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

* * * * *

Section 207 (49 U. S. C. 307):

"(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

* * * * *

Section 210 (49 U. S. C. Section 310):

"Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest

and with the national transportation policy declared in this Act—

(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

ADMINISTRATIVE PROCEDURE ACT:

Section 8(b) (5 U. S. C. Section 1007):

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The rec-

ord shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

* * * * *

Section 10 (5 U. S. C. Section 1009):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken by the rule or prejudicial error."

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No. 880

In the Supreme Court of the United States

OCTOBER TERM, 1962

SLOAN'S MOVING & STORAGE CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTER DISTRICT OF MISSOURI, EASTERN DIVISION

MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	3
Conclusion	6
Appendix	709

CITATIONS

Cases:

American Trucking Assns. v. United States, 344 U.S. 298	5
Hall, C. E., & Sons, Inc. v. United States, 88 F. Supp. 596	5
Interstate Commerce Commission v. Parker, 326 U.S. 60	3
Lang Transp. Corp. v. United States, 75 F. Supp. 915	4
Norfolk Southern Bus Corp. v. United States, 96 F. Supp. 756, affirmed *per curiam*, 340 U.S. 802	4
Railway Express Agency, Inc. v. United States, 205 F. Supp. 831	4
Southern Kansas Greyhound Lines, Inc., v. United States, 134 F. Supp. 502	5
United States v. Detroit Navigation Co., 326 U.S. 236	5
United States v. Tucker Lines, Inc., 344 U.S. 33	5
United States v. Pierce Auto Lines, 327 U.S. 515	3
Yale Transp. Corp. v. United States, 185 F. Supp. 96, affirmed *per curiam*, 365 U.S. 566	5

Statute:

Interstate Commerce Act, 49 U.S.C. 1 *et seq.*:

	Page
Section 5	3, 5
Section 5(2)	2
Section 207(a)	2, 3

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment, entered on September 11, 1962, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325 dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order granted the applica-

[1] The opinion of the district court is reported at 208 F. Supp. 567.

tion of United Parcel Service, Inc. (UPS), for a certificate of public convenience and necessity pursuant to Section 207(a) of the Interstate Commerce Act, 49 U.S.C. 307(a), authorizing common carriage of small packages by motor vehicle over irregular routes in Illinois, Indiana and Ohio, portions of Michigan, Missouri and Wisconsin, and to specified cities in Iowa (J.S. 22).

The Commission's order (J.S. 35–36) affirmed and adopted the report recommended by the hearing examiner.[2] The examiner's report was based on a lengthy administrative hearing at which 193 public witnesses appeared in support of the application by UPS. Appellant participated throughout these proceedings and opposed the grant of authority to UPS on the ground that additional parcel delivery service was not required in the areas served by appellant. At no time, however, either before the examiner or the Commission, did appellant argue that the control exercised over UPS by its parent, United Parcel Service of America, violated Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)).[3]

This contention was raised for the first time before the three-judge district court, which found that "the unlawful control issue was not properly raised before the Commission" (J.S. 32) and refused "to consider such issue except to the limited extent of determining Sloan's contention that the Commission lacked juris-

[2] For the convenience of the Court, a copy of the examiner's report, 89 M.C.C. 709, is attached to this motion.

[3] Section 5(2) requires Commission approval before any carrier or parent of a carrier acquires control of another carrier.

diction to grant the certificate" (*ibid.*). The court below rejected appellant's contention that compliance with Section 5 is a prerequisite to the granting of a certificate under Section 207 and unanimously affirmed the Commission's order (J.S. 34).

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. The determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535–536; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Since, as the district court found, "there was a factual and legal basis for the Commission's order" (J.S. 34), the order must stand.

1. Appellant contends that the district court erred in holding that a certificate of public convenience and necessity may be granted, "notwithstanding that adequate service is available and existing facilities will be adversely affected" (J.S. 8). Appellant concedes however, that it is not arguing that "adequacy of existing service is an absolute bar to a grant of new authority" or that it has "a vested right to be immunized against competition" (J.S. 10). Thus, the only question presented here is whether the Commission made a permissible evaluation of the existing service and the possible harm to existing facilities, as measured against the need for the proposed service, in determining whether the latter was required by the public convenience and necessity.

In his report, the examiner made a careful and extremely elaborate analysis of appellant's operations (89 M.C.C. 730–731), concluding that appellant "cannot provide the complete service which is proposed by [UPS] and shown to be needed" (*id.*, 741). The examiner also considered the effect of the new service upon appellant and found that "only a very small part" of appellant's traffic would be exposed to diversion, and that such exposure was in respect to a type of traffic "as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce * * *" (*ibid.*).

These findings were reviewed and affirmed by the Commission (J.S. 36) and by the court below (J.S. 26–27) which held that the "findings made by the examiner and adopted by the Commission are supported by substantial evidence * * *" (J.S. 28). The validity of the Commission's order which appellant attacks here was also upheld in *Railway Express Agency, Inc.* v. *United States*, 205 F. Supp. 831 (S.D. N.Y.). That decision, as the court below noted, "substantially supports the Commission's determination on the public convenience and necessity issue" (J.S. 28).

Finally, even assuming *arguendo* that the appellant is capable of providing the service required by shippers, this factor standing alone would not bar the Commission from certifying additional service. *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 760 (E.D. Va.), affirmed *per curiam*, 340 U.S. 802. Appellant has no "vested right to be immunized against competition." *Lang Transp. Corp.* v. *United*

States, 75 F. Supp. 915, 930–931 (S.D. Calif.); *C. E. Hall & Sons, Inc.* v. *United States*, 88 F. Supp. 596, 601 (D. Mass.), even where it may be shown that the resulting competition adversely affects its revenues. *American Trucking Assn.* v. *United States*, 344 U.S. 298, 322 (1953). The determination whether the public convenience and necessity require additional service in such case falls within the Commission's "wide range of discretionary authority". *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241.

2. There is no merit to appellant's contention that because of the alleged violation of Section 5 by UPS, "the Commission lacked jurisdiction to grant the Certificate" (J.S. 19). This argument was expressly rejected in *Yale Transp. Corp.* v. *United States*, 185 F. Supp. 96 (S.D.N.Y.), affirmed *per curiam*, 365 U.S. 566, in which the three-judge court stated (p. 106):

> However, the Supreme Court has said in *Alleghany Corp.* v. *Breswick & Co.*, 1957, 353 U.S. 151, 171, 77 S.Ct. 763, that although the Commission may require the ultimate parent to be joined as an applicant, such joinder is not jurisdictional and lack of it does not make the Commission's grant of approval unlawful.

See, also, *Southern Kansas Greyhound Lines, Inc.* v. *United States*, 134 F. Supp. 502 (W.D. Mo., 1955).

Since the issue is not a jurisdictional one, the court below properly held that appellant was barred by its failure to raise it before the Commission. *United States* v. *L. A. Tucker Lines, Inc.*, 344 U.S. 33.[4]

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[4] In the *Yale Transp.* case, *supra*, the court expressly held that the corporate structure of UPS did not violate Section 5.

3. Appellant quotes a sentence from the examiner's report to support its contention that the Commission "imposed upon Sloan's the burden of proof that the public convenience and necessity did not require the proposed service" (J.S. 9). This claim was considered and rejected by the court below, which stated (J.S. 29): "When this sentence is read in context and in the light of the report as a whole, it is perfectly clear that the burden of proof is not placed upon Sloan."

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting further review and that the judgment of the district court should be affirmed.

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APRIL 1963.

M-10670

INTERSTATE COMMERCE COMMISSION

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, *Commissioners Walrath, Webb, and Tucker* (Commissioner Walrath did not participate) held at its office in Washington, D.C., on the 27th day of October A.D. 1961.

No. MC-115495 (SUB-No. 3)

UNITED PARCEL SERVICE, INC., EXTENSION—MIDWESTERN STATES

(Cincinnati, Ohio)

Upon consideration of the application and record in the above-entitled proceeding, including the examiner's report and recommended order, the exceptions filed thereto by Railway Express Agency, Inc., and jointly by Orscheln Bros. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Sloan's Moving and Storage Co., Inc., and applicant's reply, and

It appearing, That the exceptions and reply raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Division 1 discussing the evidence in the light of such pleadings;

And it further appearing, That the examiner recommended the granting to applicant of a certificate of public convenience and necessity, authorizing the operations described in the appendix hereto;

Wherefore, and good cause appearing therefor:

We find, That the exceptions filed herein are without merit; and that the statement of facts, the conclusions, and the findings of the examiner being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the said application for a certificate, except to the extent granted in said report, be, and it is hereby, denied.

It is further ordered, That upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, within the time specified in the next succeeding paragraph, an appropriate certificate will be issued.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the

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Commission, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

[SEAL] HAROLD D. McCOY,
Secretary.

APPENDIX TO DECISION AND ORDER

Service authorized:

Operation as a common carrier by motor vehicle, over irregular routes of general commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, between all points in a territory comprised of the following States or portions thereof as follows: Illinois, Indiana, Ohio; that portion of Michigan within an area described as follows: From Detroit north along the Michigan State line to Port Huron, thence westerly along Michigan Highway 21 to Davison; thence northerly along Michigan Highway 15 to Bay City; thence westerly along Michigan Highway 20 to Mount Pleasant; thence southerly along U.S. Highway 27 to U.S. Highway 27 (alternate); thence southerly along U.S. Highway 27 (alternate) to Alma; thence easterly along U.S. Highway 27 (alternate) to U.S. Highway 27; thence southerly along U.S. Highway 27 to Ola; thence westerly along Michigan Highway 57 to the eastern boundary of Kent County; thence along the eastern and northern boundaries of Kent County to the northern boundary of Muskegon County; thence along the northern and eastern boundaries of Muskegon County (including all of Kent and Muskegon Counties) to Lake Michigan; thence southerly along the Michigan State line to the Indiana State line; thence easterly along the Michigan State line to Lake Erie; and thence northerly along the Michigan State line to Detroit; that portion of Wisconsin within an area described as follows: Beginning at the Illinois-Wisconsin State line at Lake Michigan and extending northerly along the shore of Lake Michigan to and including Two Rivers; thence northerly on Wisconsin Highway 147 to U.S. Highway 141; thence northerly on U.S. Highway 141 to and including Green Bay; thence southerly on U.S. Highway 41 to the northern boundary of Fond du Lac County; thence westerly and southerly along the northern and western boundaries of Fond du Lac County to the northern boundary of Dodge County; thence westerly and southerly along the northern and western boundaries of Dodge County to U.S. Highway 151; thence southwesterly on U.S. Highway 151 to the northern boundary of Dane County; thence along the northern, western, and southern boundaries of Dane County to the western boundary of Rock County; thence southerly along the western boundary of Rock County to the Wisconsin-Illinois State line; and thence easterly along such line to Lake Michigan; that portion of Missouri within an area described as follows: From St. Louis northwesterly along the Mississippi River to Hannibal, Mo.; thence northerly along Missouri Highway 168 to U.S. Highway 24-61; thence southerly along U.S. Highway 24-61 to U.S. Highway 36; thence easterly along U.S. Highway 36 to U.S. Highway 61; thence southerly along U.S. Highway 61 to Missouri Highway 19; thence southwesterly and southerly along Missouri Highway 19 to U.S. Highway 54; thence westerly along U.S. Highway 54 to Missouri Highway 22; thence westerly along Missouri Highway 22 to U.S. Highway 63; thence northerly along U.S. Highway 63 to U.S. High-

way 24; thence westerly along U.S. Highway 24 to Missouri Highway 3; thence southerly along Missouri Highway 3 to Missouri Highway 240; thence southerly along Missouri Highway 240 to the Missouri River; thence southeasterly along the Missouri River to Jefferson City; thence southeasterly along U.S. Highway 63 to Rolla; thence easterly along U.S. Highway 63 to U.S. Highway 66; thence easterly along U.S. Highway 66 to Missouri Highway 68; thence southerly along Missouri Highway 68 to Missouri Highway 8; thence easterly along Missouri Highway 8 to Missouri Highway 21; thence southerly along Missouri Highway 21 to Missouri Highway 72; thence southeasterly along Missouri Highway 72 to the Mississippi River; thence northwesterly along the Mississippi River to the point of beginning; and Davenport, Clinton, and Dubuque, Iowa, including all points on the described highways and those on the described county lines which do not coincide with State lines.

Subject to the following restrictions and condition:

(a) No service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and each package or article shall be considered as a separate and distinct shipment.

(b) No service shall be rendered between department stores, specialty shops, and retail stores and the branches or warehouses of such stores; or between department stores, specialty shops and retail stores or the branches or warehouses thereof, on the one hand, and, on the other, the premises of the customers of such stores.

(c) No service shall be provided in the transportation of packages or articles weighing in the aggregate more than 100 pounds from one consignor at one location to one consignee at one location on any one day.

(d) That no delivery service shall be provided under the authority granted herein to the premises of persons who or which have entered into contracts with applicant and are served by it pursuant to permits issued by the Commission.

(e) That the certificate granted herein shall be subject to the right of the Commission which is hereby expressly reserved to impose such terms, conditions, or limitations in the future as it may find necessary in order to insure that applicant's operations shall conform to the provisions of section 210 of the Interstate Commerce Act.

The statement of facts, conclusions, and findings of the examiner follow:

By application, filed January 4, 1960, as amended, United Parcel Service, Inc., of Cincinnati, Ohio, seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle, over irregular routes, of general commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, between the points in the territory described in appendix A hereto, subject to the restrictions specified therein.

The application was referred to the examiner for hearing and recommendation of an appropriate order thereon. Hearing was held at Chicago, Ill., from May 9 to May 27, 1960, and from August 8 to August 20, 1960, and at Washington, D.C., from July 25 to August 1, 1960. Fischer Trucking Co., L. A. Tucker Truck Lines, Inc., Sloan's Moving & Storage Co., Sanders Truck Line, Inc., C. E. S. Truck Lines, Inc., Orscheln Bros. Truck Lines, Inc., Cordera Transfer Com-

pany, Inc., Illinois Motor Express, Inc., Paul J. McCoy, doing business as McCoy Transfer Company, Charles Ohley, Edmund C. Ohley, and Harold L. Ohley, doing business as Ohley Transfer Company, Slay Transportation Co., Inc., Olive Wiles, doing business as R. E. Wiles Truck Service, Northwest Drayage Company, M. C. Slater, Inc., Haecki's Express, Incorporated, and Motor Freight Corporation originally appeared in opposition to the application, but Cordera Transfer Company, Inc., Illinois Motor Express, Inc., Paul J. McCoy, doing business as McCoy Transfer Company, Charles Ohley, Edmund C. Ohley, and Harold L. Ohley, doing business as Ohley Transfer Company, Slay Transportation Co., Inc., Olive Wiles, doing business as R. E. Wiles Truck Service, Northwest Drayage Company, M. C. Slater, Inc., Motor Freight Corporation, and Haecki's Express, Incorporated, withdrew their opposition to the application during the course of the hearing.

APPLICANT'S EVIDENCE

Applicant presently holds authority to operate as a common carrier by motor vehicle, over irregular routes, of general commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, over irregular routes, from Chicago to Davenport, Clinton, and Dubuque, Iowa, and described areas in southwestern Michigan, northern Indiana, southeastern Wisconsin, and northern Illinois, as more specifically described in appendix B to this report. This authority is restricted against the transportation of packages or articles weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and for the purpose of the restriction each package or article is considered as a separate and distinct shipment. It is also restricted against the rendition of service between retail stores and the branches or warehouses of such stores, or between retail stores and the branches and warehouses thereof, on the one hand, and, on the other, the premises of customers of such stores. Applicant also performs parcel delivery service as a common carrier, in intrastate commerce, between points in Illinois, between points in a described area in southeastern Wisconsin, between points in a described area in eastern Missouri, and from Cleveland, Cincinnati, and Toledo, Ohio, to all points in Ohio. It has an application pending with the Public Utility Commission of Ohio for authority to provide such service between all points in Ohio. In addition, an affiliate, United Parcel Service, Inc., an Indiana corporation, performs similar service, in intrastate commerce, between all points in Indiana, and another affiliate, United Parcel Service of Detroit, Inc., renders such service between points in a described area in southern Michigan. The areas in Michigan and Missouri served in intrastate commerce are the same as the portions of those States sought herein. The area in Wisconsin served in intrastate commerce is nearly the same as the portion of that State sought herein. Applicant was issued a certificate recently authorizing a service similar to that proposed herein between certain points in California, on the one hand, and certain points in Arizona, on the other, over irregular routes. In view of the distance between the territories involved in the two operations, the west coast authority need not be further described.

Applicant also holds authority to operate as a contract carrier by motor vehicle, over irregular routes, transporting (1) such commodities as are sold by retail department stores, between Cincinnati, Ohio, on the one hand, and, on the other, points in that part of Kentucky north of a line beginning at Grant, Ky., and extending in an easterly direction to Oneonta, Ky., and (2) new furniture and household furnishings as are sold by retail specialty shops and department stores, between such retail specialty shops and department stores and branches

and warehouses thereof, in Cincinnati, Ohio, on the one hand, and, on the other, the customers of such shops and stores at points in Kentucky and in that part of Indiana south of a line beginning at the Indiana-Illinois State line and extending along U.S. Highway 36 through Indianapolis, Ind., to its junction with Indiana Highway 67 near Pendleton, Ind., thence along Indiana Highway 67 through Muncie, Ind., to Portland, Ind., and thence along Indiana Highway 26 to the Indiana-Ohio State line. The service authorized in (1) and (2) above, is restricted to that performed under special and individual contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate retail specialty shops or department stores, for the transportation of the commodities indicated and in the manner specified above. In connection with (1) above, applicant serves about 50 retail department stores in Cincinnati in effecting deliveries of their merchandise to a contiguous area in Kentucky extending about 3 or 4 miles beyond the limits of the Cincinnati commercial zone as defined by the Commission. During 1959, about 3,978,000 packages were delivered by applicant in retail department store delivery service, of which about one-third of 1 percent moved to the Kentucky points beyond the Cincinnati commercial zone. Applicant serves six stores under the authority described in (2) above. During 1959 about 382,000 pieces of new furniture and household furnishings were delivered by applicant, of which about one-half of 1 percent were destined to points in the Indiana territory described above and about 2 percent moved to points in Kentucky beyond the Cincinnati commercial zone. The normal delivery area for this operation in interstate commerce is to points in all or portions of Union, Fayette, Franklin, Dearborn, Ripley, and Switzerland Counties, Ind., and Boone, Kenton, Campbell, Gallatin, Grant Pendleton, and Bracken Counties, Ky. Service is rendered once a week to points in these counties. Less frequent deliveries are effected to points beyond such counties in the authorized Indiana territory and in Kentucky. Applicant's vice president estimates that about 1,250 packages a day will be delivered to Cincinnati consignees in the proposed operation, of which about 1 percent will be delivered to stores under contract with applicant. In the proposed operation, shipments to stores in Cincinnati will be prepaid by the manufacturers or wholesale houses with whom such shipments originate. Applicant's contract carrier service is designed so that it, in effect, takes over the functions normally assumed by the delivery departments of the retail stores served and in some instances the motor vehicle equipment owned by such stores was purchased by applicant when it commenced serving them. Applicant provides similar contract carrier delivery service for retail department stores and retail specialty shops in Chicago, Milwaukee, Wis., and Cleveland, Ohio, but these operations are only performed in intrastate commerce.

Applicant is affiliated with nine other companies commonly owned and controlled by United Parcel Service of America, Inc., hereinafter called the parent company. They operate in various parts of the United States under the United Parcel Service designation and perform two types of parcel delivery service, hereinafter referred to as the retail service and the wholesale service, respectively. The retail service is performed as a contract carrier operation for various retail stores and is a store delivery service similar to that performed by applicant for stores at Cincinnati, previously described herein. The wholesale service is a common carrier service involving principally the delivery of small packages from manufacturers, wholesalers, and distributors to their customers. This is the type of service which applicant now performs under its common carrier authority from Chicago and which it proposes to render under the certificate sought herein. None of applicant's affiliates operate in interstate commerce from or to points in the territory involved herein. Two of the affil-

lated companies, United Parcel Service, a California corporation, and United Parcel Service of Detroit, Inc., will be merged into applicant. The stock of the parent company is owned by about 900 employees, former employees, or families or estates of former employees, with no single stockholder owning as much as 9 percent of the total stock.

At the present time the United Parcel Service companies have a total of 10,000 employees, of which 2,700 are employed in the territory involved in this application. The companies which operate in the territory involved herein, namely, applicant, United Parcel Service, Inc., an Indiana corporation, and United Parcel Service of Detroit, Inc., own and operate 2,145 vehicles in such territory. The basic trucks used for pickup and delivery of parcels consist of panel delivery trucks with a capacity just under 400 cubic feet, supplemented by smaller Volkswagen package cars, comprising a total of 1,297 units. These are supplemented by about 254 larger trucks of similar design of less than 1,000 cubic foot capacity and 5 similar trucks of over 1,000 feet capacity. About 235 additional trucks are designed for the transportation of furniture. The remaining units consist of 109 tractors and 225 trailers of a heavier character. All of the units have been designed to facilitate expeditious and safe loading and unloading of packages and to protect this type of freight from damage in transit. If the application is granted, applicant expects that its motor vehicle equipment will have to be increased by 15 to 20 percent.

A balance sheet of applicant as of December 31, 1959, shows total assets of $6,446,433, including $3,122,204 of current assets. Current liabilities amount to $2,135,542 and surplus to $1,904,591. An income statement of applicant for the period from January 1 to December 31, 1959, shows a net operating revenue of $900,370. A pro forma balance sheet of applicant and the two affiliates[1] which will be merged into applicant shows total assets of $15,133,910, including current assets of $6,815,864. Current liabilities amount to $4,286,206 and surplus to $5,240,304. A consolidated balance sheet of United Parcel Service of America, Inc., and its subsidiary companies as of December 31, 1959, shows total assets of $33,238,007, including current assets of $16,539,491. Current liabilities amount to $10,121,198 and surplus to $13,457,684. Applicant has a good safety and preventive maintence program.

Applicant divides the territories which it serves into operating areas within each of which there is established an operating center. The operating center is a terminal type facility at which panel trucks and drivers are stationed for the pickup and delivery of packages throughout the area served by the center. An automatic pickup call is made at the premises of each shipper within the operating area requesting that service, and the packages received are handled through the operating center. All packages for delivery within the operating area in which they are picked up are held overnight at the center for delivery the following day. Packages for delivery in other operating areas are delivered to central sorting hubs established at strategic locations throughout the territory served. At these hubs packages for each destination operating center are consolidated and transported thereto. Deliveries are then effected in the equipment and by the drivers employed at the operating center. At the present time, applicant has operating centers established at the following number of points in the States[2] involved in the application: Illinois 33, Indiana 19, Ohio

[1] United Parcel Service, a California corporation, and United Parcel Service of Detroit, Inc.

[2] For convenience reference hereinafter to States in the proposed territory refers only to that portion of each State included in such territory unless the entire State is embraced therein.

19, Michigan 17, Wisconsin 11, and Missouri 6. Hubs are now maintained at Milwaukee, Wis., Chicago and Decatur, Ill., St. Louis, Mo., Indianapolis, Ind., Cincinnati, Toledo, Columbus, and Cleveland, Ohio, and Detroit and Lansing, Mich. The number and boundaries of operating areas, the locations of operating centers, and the number of locations of central hubs are changed from time to time as volume patterns change or as engineering studies show changes are warranted. It is expected that if the application herein is granted, new operating areas and several new hubs will be created as a result of the additional volume of traffic which will be received. Some adjustments in boundary lines of operating areas also will be made because of the geater flexibility in operation which applicant will have as a result of a nonradial grant of interstate authority.

Most of the buildings housing the hubs and the operating centers are owned by real estate companies, whose ultimate ownership is for the benefit of the stockholders of United Parcel Service of America, Inc. Applicant and the two other United Parcel Service operating companies operating in the proposed territory lease these properties from such real estate companies. The total cost of the land and buildings leased from the affiliated real estate companies is $5,800,000. Some of the smaller buildings used as operating centers are leased from non-affiliated owners by the operating companies. The latter also own facilities other than motor vehicles in the considered territory costing $2,600,000.

Specialized facilities for the handling of packages include extended and retractable conveyors used in unloading pickup cars, conveyor belts or walker tables to move packages from unloading positions to sorting positions, electric eyes which control movement of feed belts to the sorter, recirculating crescent conveyors which carry packages around corners without damage, and automated traveling chute conveyors.

All shipments transported by applicant are handled on a prepaid basis. Applicant does not require that a shipper fill out a bill of lading for each package transported. Instead the shipper on each day lists upon a pickup record the name and address of the consignee for each package turned over to applicant, with certain other pertinent information, and this record is signed as a receipt by the driver. The driver and the shipper each retain a copy of this document, and the latter is billed for transportation performed from the information thereon. Packages are handled and delivered from the information set forth on the address label, and special labels are provided for c.o.d. and returned package shipments. Each delivered package is signed for by the consignee on a driver's delivery sheet which is kept by applicant for tracing purposes.

Applicant sent out 13,668 forms to shippers using its daily pickup service in the proposed territory requesting that they list the origin and destination of all shipments transported by parcel post on Thursday, November 5, 1960. It received 13,457 responses to this request. It also received 1,027 tallies by shippers in the proposed territory showing their parcel post shipments to 11 areas designated by applicant comprising this territory. Its representatives also called upon 1,081 other shippers in the proposed territory and obtained estimates of their use of parcel post. The results of these tadies, with one exception hereinafter discussed, are not shown of record, but they were referred to by applicant's vice president as some of the factors which he took into consideration in making an estimate of the number of additional packages which would be received for transportation from and to points in the proposed territory if the application herein is granted. Other factors mentioned by him which were considered in making this estimate were the testimony which he had heard

given by 401 shippers located in the involved territory regarding their shipping practices, adduced in support of applications by applicant before State Commissions and the Interstate Commerce Commission, and statistics published by the United States Department of Commerce. He has been employed by the United Parcel Service organization for about 35 years. Based upon the matters referred to above and his experience, the witness estimated that the proposed operation in interstate commerce would result in applicant's transporting about 50,000 additional packages a day. He also asserts that the traffic which is obtained by applicant when it commences a new operation is diverted principally from parcel post, and that, in addition, a volume is derived from that formerly transported by shippers in private carriage and from new business engendered by the extension of shippers' sales areas as a result of applicant's service becoming available.

An important feature of applicant's proposal is the providing of service at rates comparable to those for uninsured parcel post. In view thereof, evidence was presented with respect to applicant's estimates of cost and revenue per package in the proposed operation, and the basis therefor was the subject of extended cross-examination. In this connection, applicant's vice president estimates that the average cost of transportation involved in the proposed operation in interstate commerce will be 68 cents per package. This estimate is based upon his computation as to pickup expense, transfer expense, central sorting expense, delivery expense, and management and general expense involved in the handling of the increased volume of packages anticipated in the proposed operation. The meaning of the terminology used by the witness will be next considered. In general, pickup expense includes all of the cost of handling a package from the time it is received from the shipper until it reaches the first operating center and is unloaded from the pickup vehicle. Transfer expense is that incurred in moving the package from the operating center involved in the pickup to the first sorting hub, plus the expense of moving it between hubs, if more than one sorting is required, plus the expense of transferring it to the final operating center from which delivery is effected. Central sorting expense is that involved in the sorting of packages delivered to the hub from various operating centers and combining them for transfer to each of the operating centers from which delivery is effected. Where the packages move through two hubs, the cost of both sorts is included in this expense. Delivery expense is that incurred in the movement of a package from the operating center to which the package is transferred to the consignee. Management and general expense is self-explanatory and was computed by taking the same percentage of the revenue received as is taken in connection with applicant's present operations.

In making the 68 cents per package estimate, applicant's vice president anticipated that the bulk of the traffic received in the proposed operation would be obtained from customers presently using applicant's service or that of its affiliates in intrastate commerce. Reliance also was placed upon the estimate which the witness had previously made with reference to the receipt of an anticipated volume of 50,000 packages a day in the proposed operation. Although not introduced in evidence at the time the latter estimate was made, a compilation[9] of the 13,457 responses to forms which were sent out to shippers now using applicant's daily pickup service listing the origin and destination of all of their packages transported by parcel post on November 5, 1960, insofar as such packages moved in interstate commerce within the scope of the application, was received in evidence by stipulation of the parties. This compilation was used not only in

[9] Hereinafter referred to as the 1-day survey.

estimating the number of additional packages a day which would be transported in the proposed operation but also in ascertaining the amounts of the various items of expense comprising the 68 cents per package cost estimate. More than 50,000 packages moving within the scope of the application were listed in this compilation. Generally speaking, the estimated cost items comprising the 68-cent estimate were derived from a cost analysis of various operations involved in the transportation and handling of these packages in combination with applicant's present volume of packages and packages which it anticipates that it will be transporting under a grant of new intrastate authority in Ohio.

A breakdown of applicant's 68-cent per package cost estimate by functions is as follows: Pickup 6.2 cents, transfer 13 cents, central sorting 5.9 cents, delivery 30.7 cents, and management and general 12.2 cents. Applicant's present average expense for transporting a package is as follows: Pickup 8.3 cents, central sorting 3.2 cents, transfer 5.8 cents, delivery 34.5 cents, and management and general the same as above. As seen, percentagewise there is a fairly substantial reduction in pickup expense and a slight reduction in delivery expense in the estimated costs in comparison with the present costs. The lower estimated pickup cost is predicated upon applicant's anticipation that the additional packages obtained from a grant of authority herein will be from customers presently using the intrastate service provided by it or its affiliates and the conclusion that the new anticipated volume of packages moving in interstate commerce superimposed upon the present volume moving in intrastate commerce will increase the number of packages picked up at each stop. Delivery expense is not an item, which on a per package basis, will be much affected by the increased volume involved in the proposed operation, since the distances involved in the delivery movements will not change. The items principally affected are the transfer and central sorting costs, due to the longer distance and increased handling involved in the transportation of packages in interstate commerce. In making these estimates, applicant's vice president estimated that an average of 1.86 central sorts per package would be involved in the movement of packages in interstate commerce, compared to an average of about one central sort per package in the present movement of intrastate traffic.

Applicant's vice president estimates that the average revenue per package obtained from the proposed operation will be 75.5 cents. Matters taken into consideration in making this estimate were (1) average weight per package handled of 10.3 pounds in the present operations in the proposed territory, (2) proportions of package deliveries in the various parcel post rate zones as shown by the responses of 13,457 shippers in the 1-day survey previously referred to, (3) rates per package and per pound based on applicant's present rate structure applied to such packages, and (4) the extra charge per package for the handling of c.o.d packages. The rate level referred to in (3) consists of charges of 19 cents per package; 4 cents a pound or fraction thereof to packages moving to points in parcel post zones 1 and 2; 5 cents per pound on packages moving to points in parcel post zone 3; and 7 cents per pound on packages moving to points beyond parcel post zone 3. In addition, applicant has a weekly charge of $2 for an automatic daily pickup call. A charge of 25 cents is made for each c.o.d. collection. The estimated average amount of revenue per package which will be obtained from each of these charges is as follows: Per package charge 19 cents, c.o.d. charge 0.625 cents, automatic daily call service charge 3.9 cents, and poundage charge 52 cents.

The principal features of the proposed service are as follows: (1) automatic daily pickup, for which a $2 per week service charge is made, (2) deliveries

111537—63——2

to points in the proposed destination territory within 100 miles of the point of origin will be made on a next-day basis and to the remainder of the area proposed to be served on not later than a second-day basis, (3) deliveries directly into the premises of consignees, (4) pickups and deliveries to points throughout the proposed territory, (5) records for prompt tracing of packages, (6) cargo liability up to $100 a package at no extra charge, (7) three delivery attempts without additional charge, (8) refused or otherwise undeliverable packages returned to consignor automatically with no extra charge, (9) payment of c.o.d. money by consignees' checks made payable to shippers, (10) pickup of previously delivered packages for return to shipper, (11) effort made to obtain a correct address for package incorrectly addressed, (12) uniformed drivers, (13) handling of fragile merchandise with a minimum of packing, and (14) providing the aforementioned service at rate competitive with those for uninsured parcel post. Applicant's present service in the territory involved herein, within the scope of operating rights presently held, includes these features.

The wholesale service which applicant and its affiliates, United Parcel Service of Detroit, Inc., and United Parcel Service, Inc. (the Indiana corporation), have rendered in common carriage in the proposed destination territory has increased in volume from 371,674 packages transported in 1953 to 24,280,764 packages handled in 1959. The number of shippers receiving a daily pickup call in this operation at the end of the year likewise has increased from 280 in 1953 to 13,841 in 1959. Nationally the United Parcel Service companies volume in the same type of operation increased from 5,921,228 packages in 1951 to 63,008,677 packages in 1959. The number of shippers receiving a daily pickup call at the end of the year increased from 2,113 in 1952 to 31,569 in 1959. The average number of pounds per package in 1959 was 9.4.

Applicant made a study for the week ended February 6, 1960, of the shippers who have a daily pickup call in the States or portions of States named in the application to determine those who have an average volume of less than five packages a day. The number of shippers receiving a daily pickup call were as follows: Illinois 6,431, Indiana 1,373, Ohio 2,549, Michigan 2,322, Wisconsin 982, and Missouri 419. Of these, 66.1 percent in Illinois, 74.6 percent in Indiana, 67.2 percent in Ohio, 70.3 percent in Michigan, 73.8 percent in Wisconsin, and 73.0 percent in Missouri shipped an average of less than five packages a day. Of the same shippers 52.2 percent in Illinois, 67.8 percent in Indiana, 51.8 percent in Ohio, 57 percent in Michigan, 58.3 percent in Wisconsin, and 62.9 percent in Missouri did not have any packages for delivery on 1 or more days during the week.

A comparison of the proposed operation with that of parcel post shows that the former has many service advantages over the latter. In this connection, (1) applicant affords daily pickup service whereas users of parcel post service must bring their packages to the post office, (2) applicant holds out to render a fast service of not later than second-day deliveries whereas parcel post holds out no assured time of delivery, (3) applicant obtains signed receipts for packages whereas such service is available from parcel post only if a special form is executed and an additional payment is made therefor, (4) in view of (3) above, applicant is in a position to respond readily to tracing requests whereas it is impossible for parcel post to trace unreceipted packages, (5) applicant automatically provides insurance coverage up to $100 per shipment for loss and damage, with added coverage available if requested,

whereas insurance is not provided by parcel post unless certain forms are filled out and fees paid therefor, (6) applicant will make three attempts to effect delivery of a package whereas parcel post makes one such attempt, after which the package is held at the post office awaiting additional instructions, (7) applicant returns refused or rejected shipments without additional charges whereas parcel post returns such shipments for an added charge, (8) applicant will accept either checks or cash in payment for a c.o.d. shipment whereas parcel post requires purchase of a money order for remittance to consignor, (9) applicant will, at the request of the consignor, return previously delivered packages whereas to obtain this service by parcel post consignee must take packages to the post office for return, (10) applicant makes a prompt settlement for parcels lost or damaged whereas parcel post makes settlement only on insured packages and only after the filing of a special form, (11) applicant operates under a rate structure which makes its charges much easier to compute than parcel post charges, and (12) applicant's service involves less rigid packing of shipments than parcel post because the latter uses the "throw sort" system whereas applicant uses the more modern sorting facilities hereinbefore described.

Except for deliveries from one first-class post office to another first-class post office, the weight limits on a parcel post package is 70 pounds and the size limit is 100 inches in length and girth combined. On a package shipped from one first-class post office to another such post office the weight limit is 40 pounds, if the delivery is made within postal zones 1 or 2, and 20 pounds made beyond zones 1 and 2, and the size limit is 72 inches in length and girth. An exhibit prepared by applicant lists 8,989 points shown in Rand McNally's Commercial Atlas and Marketing Guide, 1960 edition, in the territory involved in this application and the class of post office located at each of these points. It shows 985 having a first-class post office, 1,075 having a second-class post office, 1,700 having a third-class post office, 885 having a fourth-class post office, and 4,344 have no post office.

To show that Railway Express Agency, Inc.,[4] does not provide a service from and to all points in the considered destination territory, such as that proposed herein, applicant, from its delivery receipts, prepared maps with markings showing the destination points served by it under existing interstate and intrastate authority during the week of February 20, 1960, in each of the States or portions of States embraced in the proposed territory. From reference to appropriate REA publications it also designated on these maps whether each of these points had REA service available thereto, or had an office located thereat but no delivery service, or had both pickup and delivery service available. The points covered by this study included 1,212 in Illinois, 4 in Iowa, 761 in Indiana, 952 in Ohio, 480 in Michigan, 328 in Wisconsin, and 202 in Missouri, and were distributed throughout the States or portions of States involved. From the total of 3,939 points covered throughout the proposed territory 46 percent had no REA service available thereat, 24 percent had an REA office but no pickup and delivery service, and 30 percent had REA pickup and delivery service.

Applicant also takes the position that it performs a type of service which will not result in any appreciable diversion of traffic from REA. It adduced evidence to substantiate this from analyses made of shipping records supporting REA exhibits in other proceedings in which that carrier opposed it. In this connection, in a proceeding before the Ohio Public Utilities Commission evidence introduced by applicant, obtained from records used to support an exhibit of REA,[5]

[4] Hereinafter for convenience referred to as REA.
[5] Involving a sample of shipments transported in March 1959.

showed that of 486 shipments handled by REA from Cleveland, 279 shipments from Cincinnati, and 211 shipments from Toledo, all destined to points in Ohio, 79.4 percent of those from Cleveland, 85.7 percent of those from Cincinnati, and 78.2 percent of those from Toledo were within the 1 to 50 pound weight bracket. At that time, applicant held authority and was transporting shipments within that weight bracket from the three named origins only to points in Ohio. Nevertheless evidence with respect to 637 shipments transported by REA from Columbus, and origin point not served by applicant, and 2,957 shipments from all other origins in Ohio not served by applicant, all to destinations in Ohio, disclosed that 79.4 percent of those from Columbus and 80.5 percent of those from the other origins not served by applicant were within the 1 to 50 pound weight bracket. Similarly, an analysis of shipping records supporting a REA exhibit in a proceeding before the New York Public Service Commission showed that from a sample of 2,169 shipments transported by REA between points in New York State other than those originating at and terminating in the New York, N.Y., commercial zone in September 1959, 71.6 percent were shipments in the 1 to 50 pound weight bracket. Applicant did not render any service between these points. However, with respect to the 104 shipments in the same sample which originated at and terminated in the New York commercial zone, 82.7 percent were within the 1 to 50 pound weight bracket. Applicant at that time did transport shipments within that weight bracket within this commercial zone. In view of the foregoing, applicant's vice president asserts that REA's transportation of as high as percentage of shipments in the 1 to 50 pounds bracket from and to points where applicant renders service on this traffic as from and to points where it does not render such service, indicates that applicant's parcel delivery service is not appreciably competitive with that of REA.

Evidence in support of the application was adduced by 193 public witnesses representing both large and small manufacturers and wholesale business establishments. The presentation of further evidence of this nature was terminated by a ruling of the examiner, in conformity with rule 1.76 of the Commission's Rules of Practice, that further evidence of this character would be cumulative. Some of the public witnesses represented concerns which individually ship packages from a number of origin points. The supporting companies shipped from the following number of origin points within the territory described in the application: 60 in Illinois, 35 in Indiana, 3 in Iowa, 20 in Michigan, 8 in Missouri, 55 in Ohio, and 17 in Wisconsin. About 75 percent of such points were origins for traffic moving to all points in the proposed territory, and the remainder were origins for traffic moving to points in portions thereof. Of the supporting public witnesses, all, except 36, represented companies which were shipping by applicant, principally in intrastate commerce, within the scope of its present authority. Nearly all of the 36 remaining concerns were receivers of freight transported by it, but did not use applicant for outbound shipments because of limitations in the scope of its present authority.

All of the supporting shippers* now use parcel post to transport packages from their places of business to points in the considered territory. Dissatisfaction was expressed with the service provided by parcel post for a number of reasons. In this connection, after some evidence had been adduced with respect thereto, it was stipulated between applicant and protestants that the use of parcel post resulted in shippers' experiencing the following difficulties: (1) it is necessary to take or send the package to be transported to the post office, (2) no signature for the receipt of such package is obtained unless it is insured, (3) tracing is-

*The term "shippers" as used herein also includes receivers where applicable.

impossible on an uninsured package and is slow with respect to an insured package, (4) only one attempt at delivery is made, (5) there is no call-return service, (6) claims are not honored unless the package is insured, and (7) a check is not accepted in payment of a c.o.d. charge, but instead, the consignee must purchase a money order. Other complaints, with respect to movement by parcel post were voiced by the supporting shipper witnesses at the hearing. Principally they were to the effect that insurance on packages must be secured at additional cost and inconvenience; that parcel post size and weight restrictions often require splitting of shipments into more than one package; that some loss or damage to packages is experienced; and that delivery of packages sometimes is slow and unpredictable. The shippers who had used applicant within the scope of its present authority expressed complete satisfaction with the service afforded, and all of the supporting companies asserted that applicant's service would be used to handle shipments now transported by parcel post if the application is granted. A few concerns also indicated that they would use applicant to supplant existing private motor carriage. About 50 percent of the supporting companies adduced evidence, with respect to the weight of the shipments made by parcel post. The majority of these concerns do not use it for shipments weighing more than 50 pounds. Nearly all of the remainder do not use it for shipments weighing more than 70 pounds. In some instances, shipments weighing more than parcel post limits have been split into more than one package and shipped separately to comply with such limits.

In addition to parcel post, most of the supporting shippers also use the service of existing motor carriers. Because of the minimum rates published by such carriers, these companies, with few exceptions, utilize this service only for shipments weighing over 50 pounds. Many do not forward shipments in motor carriage weighing less than 100 pounds. About 60 percent of the supporting companies ship by REA on more than an occasional basis. About 40 percent do not use such service or use it only occasionally, many of the latter only at the request of customers. About 50 of the shippers using REA indicated the weight of shipments forwarded by that medium. Of these, about 44 percent used express service for shipments weighing 50 pounds or more and 56 percent for shipments which include those weighing less than 50 pounds. About 75 percent of the shippers in the latter category used REA for transportation of shipments weighing 25 pounds or more. About 11 shippers used REA for transportation of shipments of explosives, narcotics perishables, poisons, and valuable articles, and 15 used such service for the transportation of packages which exceeded parcel post size limits. About 40 indicated that REA did not serve all destination points to which their shipments moved, and 7 asserted that any shipments transported by REA would have to be taken to its nearest office because that carrier did not have pickup service at the points where their business establishments were located. About 28 were not satisfied with the amount of time required for delivery of express shipments and 20 with the length of time required by REA to trace shipments. At least 8 asserted that they did not use express service because it was too costly for the movement of low-weight packages.

PROTESTANTS' EVIDENCE

REA is a nationwide transporter of small shipments utilizing truck, rail, water carrier, and air service for this purpose. It also serves 42 foreign countries directly and about 180 other countries indirectly in an international service. Its gross revenue in 1959 amounted to $460 million, of which its carload revenue was only $8 million. The carrier's principal business is the handling of less-

than-carload express shipments, of which during 1959 it transported about 64 million. In addition, it handled about 6 million air express shipments. Since 1929 REA has operated under the ownership of railroads in this country. REA experiences competition in the handling of less-than-carload express shipments from parcel post, motor freight carriers, buslines, airfreight carriers, freight forwarders, and applicant. Since 1946, because of inflation resulting in higher labor costs and competition, REA has experienced large deficits in its operations, particularly during the period from 1955 through 1959. This has resulted in a change in management and a process of reorganization, commencing during the latter part of 1959, with a view toward giving it the status of an independent enterprise in lieu of its former status as an agent or instrumentality of its railroad owners. In this connection, under the reorganization REA will have freedom to route its traffic, to price its service, and to earn a net income, but will be required to be self-supporting. The new agreement with the railroads under which its service will be performed is discussed in *Express Contract, 1959*, 308 I.C.C. 545. Since the reorganization began, REA has undertaken to increase its truck routes for shorter hauls, purchase more motor carrier equipment, and improve its terminal facilities. Eleven million dollars have been expended for this purpose. Other improvements and economies have been undertaken or are contemplated. During 1959 REA experienced a deficit of about $14,500,000 in its operations and it still has serious problems to face in its efforts to place its express operations on a self-sustaining basis.

REA has 32,456 salaried employees, of which 9,531 are located in Illinois, Indiana, Iowa, Michigan, Missouri, Ohio, and Wisconsin. In addition, it has 9,537 commission agents, of which 2,422 are located in the aforementioned 7 States. The rents paid and taxes paid by REA in this seven-State area cover 33 percent and 27 percent, respectively, of the total expenditures made by it for these purposes. The carrier owns and operates 3,009 vehicles, including trucks, tractors, and trailers in the territory covered by the instant application, and has 410 new units scheduled for delivery. Its investment in motor vehicle equipment in this area, after depreciation, amounts to $5,204,848. REA uses various types and sizes of motor vehicles adapted to the kind of transportation which it performs. It uses conveyor sorting devices at its terminal at Long Island City, N.Y., and has on order similar but improved sorting equipment for terminals at Chicago and St. Louis. The carrier has vehicle replacement and terminal improvement programs now in effect. It is closing some of its offices and concentrating the receipt and distribution of traffic formerly handled at such offices at a more limited number of points, called key points. Generally speaking, new facilities are constructed at such key points and in some instances pickup and delivery is extended to points which formerly did not enjoy such service. While the concentration of functions at key points is a relatively new development, REA admittedly has been closing offices and in some, but not all instances, shifting the functions formerly performed at the closed offices to others. REA for intercity movement of traffic principally uses space on rail passenger trains, and recently some use has been made of rail piggyback service. Short-haul traffic is being handled predominantly in over-the-road truck service. REA, in connection with its nationwide and international service, provides various special service features, principally as follows: (1) a fleet of refrigerator cars for the movement of perishables, (2) facilities for carrying livestock including racehorses, (3) hampers within which small packages can be consolidated for delivery to a distribution point, (4) local parcel delivery service in most States, (5) line-haul charges including pickup and delivery within specified pickup and

delivery limits, (6) all forms of baggage delivery and transfer for passengers, (7) special handling of valuables, (8) stopping of shipment in transit and reconsignment, (9) no restrictions as to size, weight, or class of shipment which it will handle, (10) movement of convention display and similar sets from town to town, including erection and dismantling thereof, (11) shipping of express collect, c.o.d., and partially collect, (12) lot shipments of more than one package charged for as one shipment, (13) acceptance of c.o.d. shipment or shipments delivered on trial, (14) receipts to both shipper and receiver when desired; (15) collection and disbursement of money for customers, (16) purchases for customers, and (17) sales for customers. REA uses rail and air service principally in line-haul operations, and both facilities are coordinated so that joint use may be made thereof.

REA introduced in evidence an exhibit listing all pieces or packages loaded on July 19, 1960, for line-haul movements from Detroit to Cleveland and Chicago, from Chicago to Columbus, Cleveland, Indianapolis, and St. Louis, from Cincinnati to St. Louis and Cleveland, from St. Louis to Chicago and Cincinnati, from Cleveland to St. Louis and Chicago, and from Columbus to Chicago. These pieces included those originating within the pickup limits of the origin cities and those destined within the delivery limits of the destination cities. The exhibit was prepared from counts made by protestant's employees at the points referred to therein. The exhibit disclosed that of 1,159 pieces loaded on July 19, 1960, at the origins shown, 985 were unloaded and placed on vehicles for delivery on July 20, 1960. An additional 17 pieces moving from Chicago to St. Louis were loaded on such vehicles on July 21, 1960, leaving only 27 pieces which were not placed on delivery vehicles by the second day. A large number of pieces which were loaded on and off of the cars or trailers performing the line-haul movements from and to the aforementioned points had ultimate origin or destination at points beyond the collection or delivery areas of the considered points and, therefore, were excluded from the study.

Using 51,325 IBM cards covering parcel post packages moving in interstate commerce within the territory involved herein made by applicant's present customers as shown in the 1-day survey, previously referred to herein, REA prepared an exhibit showing the percentage of packages which originated at points where REA affords pickup service and the percentage moving to points where it affords delivery service. This evidence reveals that 98.6 percent of the packages shown in the survey originated at points where REA has pickup service. Seventy-two percent of the packages originated at cities of over 100,000 population, all of which have pickup service by this protestant. REA also provides delivery service at destinations for 91 percent of the packages covered by the survey. Sixty percent of the packages were destined to cities with populations of 25,000 or more, all of which have delivery service by REA. Admittedly REA's study did not take into consideration the fact that some parcel post packages which originated at or were destined to post offices may have had an ultimate origin or destination outside of the communities in which such post offices were located. REA has pickup and delivery service at 1,277 points in the considered territory and offices but no pickup and delivery service at 1,051 additional points therein.

An exhibit introduced in evidence by applicant, previously referred to herein, listed the number and percentage of points at which applicant made deliveries during the week of February 20, 1960, to which REA either had no service, an office but no pickup and delivery service, and both pickup and delivery service. REA also introduced in evidence an exhibit showing that the points involved

in this 1-week study have a total population of 25,429,355; that 3.6 percent of the persons comprising this population had no REA service available; that 3.3 percent of such persons had an REA office located in their communities but no delivery service available; and that 93.1 percent of such persons had both pickup and delivery service available. In the preparation of the exhibit, REA was credited with having pickup and delivery service at all cities where it affords pickup and delivery service and consideration was not given to the fact that at some points its pickup and delivery service extends to an area which is less than the corporate limits of such cities.

REA in a test check of 285 points located throughout the territory described in the application herein at which it has telephone listings found that applicant only has telephone listings at 21.8 percent of these points, and that REA also has listings in the classified (yellow) telephone directories at 62.8 percent, and applicant has such listings at 10.2 percent, of these points. REA has between 1,600 and 1,800 offices located in the considered territory, of which about 600 are offices with salaried employees. The others are mainly joint offices with railroads. REA maintains telephone listings at all of its salaried offices and at some of its other offices.

An exhibit presented by REA showing a comparison of REA's charges and applicant's proposed charges discloses that, for example, on shipments weighing 10 pounds moving from Jefferson City, Mo., to St. Louis, Mo., a distance of 130 miles, REA's first-class charge is 420 percent of applicant's charge; from the same origin to Indianapolis, Ind., a distance of 370 miles its first-class charge is 337 percent of applicant's charge; and from that origin to Ashtabula, Ohio, a distance of 625 miles, its charge is 370 percent of applicant's charge. On shipments of 10 pounds moving under illustrative REA incentive rates applicable on shipments aggregating 1,500 pounds or more, limited to certain designated commodities, furnished by a shipper at Jefferson City on 1 day, and which may move to a number of destinations, REA's charge to St. Louis is 264 percent, to Indianapolis is 209 percent, and to Ashtabula is 228 percent of applicant's charge. On shipments weighing 35 pounds from Jefferson City, REA's first-class charge to St. Louis is 208 percent, to Indianapolis is 166 percent, and to Ashtabula is 205 percent, of applicant's charge. On shipments of the same weight moving under incentive rates, aggregating 1,500 pounds or more, REA's charge to St. Louis is 125 percent, to Indianapolis is 100 percent, and to Ashtabula is 122 percent, of applicant's charge. On shipments weighing 50 pounds, REA's first-class charge from the same origin to St. Louis is 173 percent, to Indianapolis is 145 percent, and to Ashtabula is 181 percent, of applicant's charge. On shipments of the same weight moving under incentive rates, aggregating 1,500 pounds or more, REA's charge to St. Louis is 104 percent, to Indianapolis is 85 percent, and to Ashtabula is 107 percent, of applicant's charge. On shipments weighing 100 pounds,[7] REA's first-class charge from Jefferson City to St. Louis is 124 percent, to Indianapolis is 116 percent, and to Ashtabula is 148 percent, of applicant's charge. On shipments of the same weight moving under incentive rates, aggregating 1,500 pounds or more, REA's charge to St. Louis is 73 percent, to Indianapolis is 67 percent, and to Ashtabula is 86 percent, of applicant's charge. REA's incentive rates are applicable to only certain designated commodities and on some of these commodities are available only from certain designated shipping points. On shipments moving under REA's first-class charges in eastern

[7] Invciving two packages, each weighing 50 pounds and considered as separate shipments, both from the same shipper to the same receiver, when handled by applicant.

territory, the minimum charge on certain commodities is $2.36 and on other commodities is $2.57. On shipments in the considered area on which eastern territory charges are not appreciable, the minimum charge is $2.36. There has been a continuous increase in these minimum charges since April 15, 1959, to the extent that the present minimum charges are about 10 times as large as they were in 1939. The same exhibit also shows that on shipments of 10, 35, 50 and 100 pounds from Jefferson City to St. Louis, Indianapolis, and Ashtabula, applicant's charges are lower than those of parcel post.

Traffic handled by REA which is not attractive from a revenue standpoint includes such items as lamps and lampshades, convention exhibits, millinery, men's hats, holly handbags, X-ray tubes, incandescent lamps, electronic tubes, live creatures, cut flowers, plants, bakery goods, fish and seafood, explosives, poisons, acids, and baggage. This type of freight covers about 25 percent of that handled by REA. However, on cross-examination carrier's assistant general traffic manager admitted that much of the traffic in this category also is transported in substantial volume by REA's competitors or in private carriage, and that REA considers it to be desirable traffic.

REA's shipments weighing 25 pounds or less during the 12-month period beginning February 1, 1958, amounted in number to 28,550,830 or 43.9 percent of its total shipments; those weighing 50 pounds or less to 50,450,400 or 77.57 percent of such total; and those weighing 100 pounds or less to 59,977,255 or 92.22 percent thereof. REA's shipments include those which consist of more than one piece or package. Twenty-six percent of its shipments are transported from 1 to 250 miles, 20.15 percent are moved from 251 to 500 miles, and 13.7 percent are handled from 501 to 750 miles. REA's rates admittedly during the period from 1940 to date have increased about 155 percent.

A research analyst employed by REA, who has been engaged for 4 years in making sampling surveys on its behalf, prepared a letter of instructions, accompanied by appropriate forms, which letter was signed and sent by his superior, outlining to field employees the procedure to be followed in a sampling survey of the proportion of REA's traffic which is vulnerable to diversion to applicant if the application herein is granted. Counts were made by employees of REA on specified dates pursuant to instruction to count pieces weighing not more than 50 pounds and not exceeding 108 inches in length and girth combined, moving from and to points in the considered territory, excluding intrastate shipments and those embraced in the exceptions and restrictions in the application. This work was done at 45 points and varied from a count of every 15th piece or 8th piece* at the larger cities to every piece or every other piece at the smaller points. Based upon the returns to these counts, the witness expressed the opinion that REA transported approximately 280,000 pieces a month subject to such diversion. The witness making this estimate erroneously omitted pieces moving from the Chicago commercial zone, and based upon a monthly report of REA showing the total number of pieces originating at points in the Chicago commercial zone he estimated that about 60,000 pieces a month moved in interstate commerce from such zone to points in the proposed territory beyond the scope of applicant's present interstate authority. His original estimate accordingly was revised to include these additional pieces.

An assistant vice president-traffic of REA made an estimate on behalf of this protestant as to the percentage of the 340,000 pieces per month estimated to be exposed to diversion if this application is granted. This witness has been em-

* Includes an individual package which is part of a shipment comprising more than one package.

111537—63——3

ployed by railroads and shippers during the past 44 years. He served, among other capacities, as general traffic director of the Fisher Body Corporation and was a member and later chairman of both the Standing Rate Committee of the General Motors Traffic Association and the Executive Committee of General Motors Traffic Association. He terminated his employment by retirement with the General Motors interests on November 1, 1959, and commenced employment with REA on February 1, 1960, about 6 months prior to the date of the hearing on July 28, 1960. During the period of his employment, he contacted shippers, mainly those connected in one way or another with the automotive industry, in an effort to retain and attract traffic to REA. Based upon his experience both before and after employment by REA, he estimated that this protestant would lose about 85 percent of the 340,000 pieces per month estimated to be exposed to diversion, if the instant application is granted. It was his opinion that the minimum loss experienced would be at least 65 percent, and the maximum 100 percent, of this traffic. On cross-examination it was developed that the opinion of the witness was not based upon any special studies and that he was not familiar with the size limits of parcel post, the percentage of REA pieces embraced in the aforementioned 340,000 pieces which were included in multiple-piece shipments, and the percentage of such traffic moving at rates higher than parcel post rates or higher than truck rates. He also indicated that he had not made any special studies to determine the difference in traffic volume which might have been experienced by REA with respect to shipments weighing 50 pounds and under moving in interstate commerce from Chicago to points in part of the considered territory or in intrastate commerce in Ohio, Illinois, Indiana, and Michigan before and after applicant obtained authority to perform such service.

REA's president also expressed the opinion that if the instant application is granted protestant will lose about 2 million shipments a year to applicant, resulting in an annual net loss of about $5 million. In making this estimate the witness admittedly did not know the volume of traffic transported by his company in either intrastate or interstate commerce in any part the proposed territory before or after applicant began its operations therein under appropriate operating authorities. He asserts that too great a dilution of the available traffic among the different carriers is one of the major causes of the so-called small shipments problem; that the further entry of applicant into the field to the extent proposed in the application will further aggravate this problem; and that REA needs the lucrative small shipments traffic to enable it also to handle the more burdensome or less desirable traffic in this field.

REA filed an application in No. MC-66562 (Sub-No. 1671) on May 2, 1960, seeking authority as a common carrier by motor vehicle of general commodities moving in express service, between points in the territory involved in the instant proceeding. At the same time it filed a petition for consolidation of this proceeding with that here considered for hearing and decision. This application and petition were filed only 7 days prior to the commencement of the hearing in the instant proceeding, which was too late for the filing of replies and processing thereof prior to such hearing, and protestant was so notified by letter. On November 1, 1960, the petition for consolidation was denied "for the reason that no good cause appears for consolidation at this time."

REA's president asserts that its application was filed because the instant application was filed and that its position is that if a package delivery service over irregular routes throughout the aforementioned territory is to be provided, it should be afforded by a carrier which is already in the field and which will transport the traffic on an all-inclusive rather than a pick and choose basis. He

also claims that applicant, in excepting certain commodities from its application has excluded unprofitable traffic; that it has made its operation more economical from a freight handling standpoint by imposing weight and size limitations; and that by the imposition of a weekly pickup charge has made its service available only to regular shippers. He asserts that the filing of REA's application was a defensive measure, and that he would not want to have it institute the operation proposed therein now if the application filed by applicant herein was denied. However, he believes that if the authority sought by REA in the aforementioned application is granted, it could render a more economical and expeditious service than it now provides in the considered territory.

REA admittedly is offering so-called incentive rates for larger volumes of the more attractive traffic such as wearing apparel and automobile parts. About 8 percent of its volume moves under such rates. It is anticipated that such rates will raise the average weight of shipments of wearing apparel transported from about 38 pounds to 58 pounds. At the present time REA is endeavoring to obtain more shipments weighing around 100 and 125 pounds now handled by its competitors. REA's present average weight per shipment is 48 pounds and its average weight per piece is 26 pounds.

The soundness of the cost estimates made by applicant's vice president was challenged by the assistant comptroller of REA. In this connection, attention was directed to the fact that during the period from 1955 to 1959 the number of packages handled by applicant and its affiliates in the involved territory increased from 4,535,988 to 24,280,764 per year, an increase of about 435 percent. During the same period, REA's witness, from information furnished in applicant's evidence, computed the number of packages per pickup stop received by applicant and found that such packages declined from 10.48 to 7.79 per stop, or about 26 percent. In the circumstances, REA's witness asserts that the estimated decrease in pickup expense from 8.3 cents per stop to 6.2 cents per stop, as a result of an increase in the number of pickups per stop anticipated by applicant, is contrary to the trend shown in its past operations. REA's assistant comptroller, from similar information, also made computations which indicated that the number of packages transported by applicant during the last 6 months of 1959 increased 15 percent over the number handled during the preceding 6 months, and that the delivery expense for the same period increased 9½ percent over that for the first 6 months of that year. Accordingly, he likewise asserts that reduction in the average delivery expense per package anticipated by applicant from the present 34.5 cents to 30.7 cents in the proposed operation is not in accord with the trend in past operations.

An investigation was made by REA with respect to the service made available by applicant or its affiliate in present operations from Chicago, New York City, and Boston, Mass., to individuals, as distinguished from business establishments, shipping a single package or several packages a week from their residences in interstate commerce. For convenience, with reference to this investigation, both applicant and its affiliate will be referred to as applicant. It subsequently was broadened to test the observance by applicant of the 50-pound weight limitation in its authorities. In connection with the investigation about 24 calls were made to applicant's offices by special agents of REA representing themselves as individual shippers. The reports of the agents submitted in evidence show also that a few shipments were made on behalf of REA agents by business firms, but apparently these were the result of a misunderstanding on the part of these agents and, therefore, such shipments need not be further considered. Of the 24 calls, 8 were merely for the purpose of requesting information from appli-

cant's employees. With regard to six of these, the agents' reports indicate an unwillingness to pick up one or several shipments from the residences of individuals. In several instances the agents were advised that it would be cheaper to ship individual packages by REA, and in one it was suggested that the package be brought to applicant's terminal to avoid the weekly service charge. As to the two other information calls, applicant's employees showed a willingness to accept single shipments if the shipper would pay the carrier's weekly service charge, but suggested that the packages be brought to its terminal in order to eliminate this expense. The 16 remaining calls for service relate to requests for handling specific shipments, a total of about 34. Of these, about 30 were transported by applicant or applicant's employees indicated a willingness to accept them if tendered. The handling of the shipments in all instances was made contingent upon the payment by the shippers of applicant's weekly service charge. Five of the shipments transported weighing 52, 53, 53, 54, and 53 pounds, respectively, were accepted by applicant's drivers. On one shipment of 52 pounds and another of 53 pounds, the shipments were accepted after the driver advised the shipper of applicant's 50-pound weight limitation, and at his suggestion the pickup sheets were changed to show the weights of the packages as 50 pounds. In one of these instances, the driver was advised that the shipper was not certain of the accuracy of his scale and that 53 pounds was in the nature of an estimated weight. The four shipments which were refused by applicant included two which were offered individually, and the shipper was advised that applicant would not handle the shipments on "an individual basis" but would handle them on "a weekly basis." The remaining two shipments weighed 53 and 54 pounds, were tendered at applicant's office, and acceptance, because of overweight, was refused.

A stenographer employed by REA at Green Bay, Wis., found through a customer, that applicant could not be contacted at a point closer than Milwaukee, Wis. His letter request for service to Beloit, Wis., as an individual shipper was not sent to the proper address and was unanswered. Applicant's intrastate certificate is restricted in such a manner as to preclude the handling of shipments for private individuals. In addition, REA's agent at Saginaw, Mich., learned from applicant's Lansing office that applicant's places of business at Detroit and Lansing were the only offices where calls could be made for service in Michigan. The agent sent two letters requesting service from applicant using the name and address of another employee who was not present at the hearing for cross-examination. A salesman employed by REA at Detroit in a conversation with an employee of applicant in "Customer service," was advised that applicant would make a pickup at a private home if it had to but did not want that type of traffic. He also was advised that REA was a carrier which was engaged in handling this kind of traffic; that a customer shipping from a private home would have to pay $2 a week for a daily pickup; and that if the customer brought his package to applicant's office a pickup fee was not required.

The wife of one of REA's agent owns a retail dress shop, called the Angola Dress *Shop*, at Angola, Ind. At the request of her husband she asked a driver for applicant to transport a coat to an individual at New Harmony, Ind. The coat did not involve a sale by her store and the shipment was made only for a testing purpose. The driver asked her "are the things that you are going to ship out going to be wholesale?" She replied in the affirmative. The driver consented to take the shipment and she received a daily pickup call from applicant for 6 weeks for which she was assessed a $2 per week pickup charge. The bills sent to her for such charges were adressed to the Angola Dress

Company. According to the witness, this billing was made pursuant to a telephone call by an employee of applicant after she had given him the same information as she had previously given the driver. The employee advised her that because applicant only transported wholesale packages, she would have to call her business the Angola Dress *Company*.

Seventy-six shippers appeared on behalf of REA in opposition to the application. In addition, the evidence of three others was received by stipulation. Of these 79 companies, 8 are shippers of cut flowers and plants, and 1 is an association of growers and wholesalers of these commodities. The shipments made or received by such companies are highly perishable, require careful handling, and are forwarded so as to move on fast trains. Many exceed applicant's weight and size limitations. These concerns considered REA to be the only medium which can provide this type of transportation satisfactorily. Four other REA supporters are shippers of live animals and other commodities used for medical or other research purposes, and do not know of any carrier except REA which will transport live animals. Three concerns ship or receive fresh or frozen seafood and two others are distributors of human blood and plasma. These commodities require protection against heat or cold, a service which REA has afforded very successfully. For this reason, they would not use applicant's service, if authorized. On traffic requiring large volume movements in a short period of time, REA affords special assistance to insure proper delivery of the freight at the time required. For example, two of the opposing shippers are large distributors of printed advertising and other material to automobile dealers, one is the publisher of a large news magazine which must be distributed nationally within a very short time after publication, and another sells and rents caps and gowns on a nationwide basis principally to schools for graduation exercises. REA plans for these operations with the shippers and stations employees at their places of business to expedite the handling of the traffic. The representatives of these companies are not interested in applicant's proposal because of the specialized type of service which they now receive.

The remaining shipper supporters of REA generally are also satisfied with the service provided by that carrier. A number of the service features with which they find satisfaction in the use of REA are not characteristic of the service proposed by applicant. These include (1) the handling of shipments which exceed the weight or size limitations in applicant's proposal, (2) the forwarding or receipt of shipments on which freight charges are paid by consignee, (3) the providing of more than one pickup a day for as many as 7 days a week when requested, (4) the movement of high value freight in a security service wherein employees handling the shipments are required to sign therefor, (5) the availability of local REA offices at or near the points of origin and destination with which easy and frequent contacts can be made with reference to pickups, deliveries, tracing, claims, and shipping information, (6) the furnishing of an express receipt for each shipment tendered, which some of the companies find essential or desirable for their accounting procedures, (7) nationwide coverage, and (8) incentive rates based upon the total weight of freight furnished by a shipper on a particular day. Nearly all of the shippers appearing in opposition to the application refer to one or more of the aforementioned REA service features as the reason for their appearence herein. Other features of REA's service which they have found to be commendable include expedition and reliability in the handling of shipments of an urgent character, prompt tracing, and careful handling of traffic which is of a fragile nature. With a few exceptions hereinafter discussed, representatives of these companies indi-

cated that they oppose the granting of the application herein because of their apprehension that the granting thereof might result in a deterioration in the service provided by REA or by an increase in rates by that carrier as a result of the diversion of traffic to applicant. The witnesses were cognizant of the fact that REA had filed an application seeking authority as a common carrier by motor vehicle of general commodities moving in express service, between points in the proposed territory and, except as hereinafter indicated, expressed a preference for the granting of this application rather than that filed by applicant herein. Except as hereinafter noted, they asserted that they would not divert any traffic to applicant if the instant application was granted. A majority of the opposing companies are presently using parcel post in addition to REA. A few are using applicant's presently authorized service, principally in connection with small movements of inbound traffic.

Three of the companies offering evidence for REA made estimates of the volume of traffic which they anticipate would be diverted from REA to applicant if the instant application is granted. Four others evinced an interest in the use of applicant's service in such event, but did not indicate the extent, if any, to which there would be a diversion from REA, and all four are also users of parcel post. Representatives of 3 of the 7 companies expressed the view that there was a place for both applicant and REA in the transportation field.

Sloan's Moving and Storage Co., hereinafter referred to as Sloan's, of St. Louis, is engaged in household moving and storage business, general hauling, and parcel delivery service. In connection with the latter, it holds authority to operate as a common carrier of general commodities, with the usual exceptions, restricted to parcels not exceeding 100 pounds each, from St. Louis to points in St. Louis and St. Charles Counties, Mo., and points in that part of Illinois bounded on the west by the Mississippi River and on the east, north, and south by a line beginning at Chester, Ill., and extending along Illinois Highway 150 to its junction with Illinois Highway 154, thence along Illinois Highway 154 to Pinckneyville, Ill., thence along Illinois Highway 127 to Hillsboro, thence along Illinois Highway 16 to its junction with U. S. Highway 66, thence along U. S. Highway 66 to its junction with Illinois Highway 108, thence along Illinois Highway 108 to its junction with Illinois Highway 96, and thence along Illinois Highway 96 to the Mississippi River, including points on the indicated portions of the highways specified. Sloan's likewise holds authority to conduct a parcel delivery service in intrastate commerce in St. Louis, St. Charles, and Jefferson Counties, Mo. In No. MC-40861 (Sub-No. 4) *Sloan's Moving and Storage Co. Ext.—Illinois Points*, 84 M.C.C. 802 (not printed in full), decided March 14, 1961, it was granted authority to extend its service to the extent described in appendix C hereto. Sloan's has a terminal at St. Louis and owns and operates 55 Vanette-type trucks which are utilized in parcel delivery service. It employs 60 people in this operation. Packages picked up on one day are routed through its terminal and, except for unusual circumstances, are delivered on the following day. On mail orders or packages received at the terminal early in the morning same-day delivery is afforded. Uniformed drivers provide service to any point within the carrier's authorized territory. Sloan's employs seven salesmen and advertises its service over the radio and in the telephone directory and newspapers. Its parcel delivery service includes such features as obtaining signatures when desired for receipt of packages, cargo insurance on all packages, two automatic calls to effect deliveries, return of undeliverable packages to the shipper with no extra charge therefor, handling of c.o.d. shipments, return of refused, damaged, or rejected

shipments, and correction of wrong addresses on packages whenever possible. Sloan's rates are on about the same level as applicant's. About 99 percent of its shipments consist of single packages.

A survey of the number of parcels handled by Sloan's during the 10-day period from June 20 through July 1, 1960, disclosed that 25,878 were transported during that interval. About 25 percent of these were on behalf of wholesalers and 75 percent were on behalf of retailers. Of the 25,878 packages, 5,522 were transported in interstate commerce beyond the St. Louis commercial zone, of which 3,594 or 65 percent were for wholesalers and 1,928 or 35 percent were for retailers. The remainder of the shipments were either transported in intrastate commerce or within the St. Louis commercial zone. The 5,522 retail and wholesale deliveries were effected at 103 points in Missouri and Illinois beyond the St. Louis commercial zone. The interstate shipments moving to Missouri points were delivered to Sloan's at St. Louis by connecting carriers which obtained the traffic from out-of-State origins.

Another survey of packages handled by Sloan's in both its wholesale and retail parcel delivery service during the 5-day period October 19 through October, 23, 1959, reveals that 96.10 percent of the packages transported weighed 25 pounds or less; that 2.58 percent weighed between 26 and 50 pounds; and that 1.31 percent weighed between 51 and 100 pounds. The average weight per parcel handled by Sloan's is about 6¼ pounds. The carrier had operating revenue of $948,592 and enjoyed an operating ratio of 90.0 in 1959. About 50 percent of this revenue was obtained from its parcel delivery business.

Orschein Bros. Truck Lines, Inc., of Moberly, Mo., hereinafter called Orschein Bros., is a common carrier by motor vehicle of general commodities, with exceptions, over regular routes extending generally between St. Joseph, Mo., and Kansas City, Kans., on the west, and Chicago and Springfield, Ill., and St. Louis, on the east. It maintains 33 terminals, including those, so far as pertinent, at Chicago, Peoria, and Quincy, Ill., and Hannibal, Monroe City, Moberly, Columbia, Jefferson City, Mexico, Centralia, St. Louis, and Bowling Green, Mo. The carrier owns and operates 57 trucks, 142 tractors, and 232 trailers. A daily overnight service is afforded between points it is authorized to serve, except to certain off-route points served from Chicago. Orschein Bros. has minimum charges applicable to the handling of shipments weighing 100 pounds or less. Its rates admittedly are much higher than applicant's on shipments weighing from 1 to 50 pounds. The carrier's service includes pickup and delivery, routine stops at places of business of shippers who have daily shipments, signatures for the receipt of shipments, cargo insurance, more than one delivery attempt if necessary, return of undeliverable or refused packages at the request of the shipper, and handling of c.o.d. shipments. The carrier handles from 1,800 to 2,200 shipments a day. An exhibit presented by it listing shipments comprised of packages weighing 50 pounds or less for the 5-day period from May 2 through May 6, 1960, shows that only about 40 shipments in the exhibit, or an average of 8 per day, weighed less than 50 pounds. This exhibit does not include shipments originated by Orschein Bros. at St. Louis, from which about 50 percent of its interstate traffic originates. Shipments set forth in the exhibit weighing more than 50 pounds consisted of more than one package per shipment, and protestant's witness did not know whether some of the packages in these multiple-package shipments weighed more than 50 pounds or whether some were larger than the size limitations specified in the application. A large proportion of the shipments weighed several hundred pounds or more and many consisted of so many packages that applicant's charges thereon would be much higher than protestant's.

In the circumstances, the exhibit is not a reliable criterion as to the traffic subject to diversion on shipments other than those weighing 50 pounds or less. The carrier's gross volume in 1959 was $4,250,000 and its operation ratio for that year was 93.9.

Elfrink Truck Lines, Inc., hereinafter called Elfrink, of Advance, Mo., appeared in support of the protest filed by Tucker. Elfrink, so far as pertinent, holds authority to operate as a common carrier by motor vehicle, of general commodities, with the usual exceptions, over irregular routes, between Advance and Lutesville, Mo., and points within 30 miles of each, on the one hand, and, on the other, St. Louis, Mo., and East St. Louis, Ill. Its only interest herein is with respect to traffic which it transports between St. Louis and Cape Girardeau. It maintains terminals at St. Louis, Advance, and Cape Girardeau and operates 8 tractors, 11 trailers, and 2 pickup trucks. It offers overnight service between St. Louis and Cape Girardeau.

L. A. Tucker Truck Lines, Incorporated, hereinafter called Tucker, operates as a common carrier by motor vehicle, of general commodities, with exceptions, over regular routes extending generally between St. Louis and Memphis, Tenn., and Evansville, Ind. Its primary interest in opposing this application is with respect to its authority to transport general commodities, with the usual exceptions, over two routes, (1) between St. Louis and Perryville, Mo., and (2) between East St. Louis, Ill., and Cape Girardeau, Mo., serving specified intermediate points including St. Louis, Jackson, and St. Genevieve, Mo. The carrier maintains terminals, so far as pertinent, at St. Louis, St. Genevieve, Perryville, and Cape Girardeau and an agency station at Jackson. It operates 39 trucks, 51 tractors, and 93 semitrailers. Its headquarters are at Cape Girardeau, at which point it has a maintenance garage. Tucker interchanges with numerous motor carriers at St. Louis. The freight which it transports is primarily of a less-than-truckload character, and interchange traffic constitutes "the backbone" of its business. It has no restrictions as to the size or weight of packages it will handle. It publishes minimum rates such, for example, as an interstate rate of $2.40 from St. Louis to Cape Girardeau. The minimum charges generally are applicable to shipments weighing less than 100 or 125 pounds. Overnight service is offered on less-than-truckload shipments from St. Louis to points served by the carrier. An exhibit listing shipments comprised of packages weighing 50 pounds or less transported on 2 days, March 14 and March 28, 1960, covers 68 shipments. Of these, 39 weighed 100 pounds or less, had a total weight of 2,219 pounds, and produced $62.25 in revenue. The shipments listed which weighed more than 50 pounds consisted of more than one package. Tucker's witness admitted that whenever a shipment weighing over 100 pounds consists of multiple packages, use of applicant's service from a rate standpoint would be prohibitive. During 1959 the carrier's operating revenue amounted to $1,000,000.

APPLICANT'S REBUTTAL

In rebuttal, applicant's vice president points out that the increase in the number of packages transported in common carrier service in the considered territory during the 1955–59 period, referred to in the oral evidence of REA's comptroller, has been accompanied by continuous expansion of the area served. In this connection, service by applicant was first inaugurated in the involved territory in April 1953, commencing with movements in the Chicago area and was expanded at various intervals until in October 1956 it covered the State of Illinois in intrastate service. In April 1957, the operations were extended to cover service from Chicago to points in portions of Wisconsin, Illinois, Indiana, and

Michigan and Davenport, Clinton, and Dubuque, Iowa, as described in apendix B. Operations in intrastate commerce in Missouri were commenced in February 1958. Intrastate service in Indiana began in January 1959. The first operations within the Cincinnati commercial zone commenced in the fall of 1954 and those within the Cleveland commercial zone in March 1954. Subsequently these operations were extended from both origins to all points in Ohio, in intrastate commerce. This was effected in about October 1956. In January 1958, intrastate service was commenced from Toledo to all points in Ohio. Operations in intrastate commerce in Wisconsin were begun in October 1954 and extended in August 1955. Service in the Detroit commercial zone was instituted in the fall of 1955 and extended in intrastate commerce throughout the Michigan area involved herein in May 1958. In the opinion of the witness the extension in territories served during the 1955–59 period is a major factor in the increase in the number of packages shown during that period and also in the large increase in the number of shippers served. The estimate of applicant's vice president of added volume of packages which would be received in the proposed operation was based upon packages which he anticipated would be obtained from shippers now using applicant's service under existing authorities, and no attempt was made to estimate the volume which would be received from new shippers not presently served.

Applicant uses paid advertisements in newspapers throughout the territory considered herein to inform the public of the character of the service which it provides. The advertising is directed to wholesalers and manufacturers, which normally would be regular users of its service. It also has a current mailing list of 53,000 names of business firms to whom circulars describing its service are sent. Its vice president estimates that 120,000 firms in the Midwest have received its circulars during the last 5 years. About 70 solicitors are employed in this area, and applicant's drivers secure many sales contacts through their deliveries to numerous consignees.

Applicant's vice president estimates that odd-shaped, odd-sized, fragile, and other similar shipments requiring special handling constitute about 20 percent of applicant's total volume of packages. Applicant's service commences and terminates upon a verbal request of the shipper, and no contract is entered into at or before service begins. Although applicant rarely receives requests for one-package pickups, specific instructions have been issued recently to prevent any misunderstanding by its employees as to its willingness to perform such service if called upon. However, in order to obtain such a pickup, it is necessary for the shipper to pay the $2 weekly service charge.

An exhibit listing all cities and communities in the area proposed to be served herein having populations shown in the Rand McNally Commercial Atlas and Marketing Guide, 1960 edition, hereinafter referred to as the Rand McNally Guide, and showing whether REA has service available and, if so, the character of such service, was introduced in evidence by applicant in rebuttal.

This evidence is set forth in the tabulation below:

State	With REA delivery	REA office but no delivery	No REA office or delivery	Total
Illinois	329	434	1,497	2,260
Indiana	173	224	1,442	1,839
Iowa	4	1		5
Michigan	177	54	633	864
Missouri	65	50	503	657
Ohio	359	148	2,319	2,858
Wisconsin	84	73	326	483
All States, total	1,292	1,046	6,681	8,939

Reference above to a State refers only to that portion included in the application unless the entire State is embraced within. Another exhibit submitted by applicant shows that during the period from April through August 1960 there were 7 closings of REA offices in Illinois, 12 in Indiana, 13 in Michigan, 3 in Missouri, 14 in Ohio, and 2 in Wisconsin, which required persons residing at the point where the closings were effected to travel to other points from 3 to 25 miles distant to receive packages transported by REA. The points involved had populations ranging from 75 to 1,981. Admittedly some changes in service effected by REA in these States during the same period also involved extensions of its pickup and delivery service. However, the changes in service by REA during this period in all of these States resulted in a net decrease of 6 points with delivery, a net decrease of 9 points with offices but no delivery, and a net increase of 15 points with no office and no delivery.

Applicant computes the total population of the territory involved herein from the Rand McNally Guide as 36,375,900. Using the same population source, it also computes the number of persons residing at points where REA has pickup and delivery service as 24,782,100 or 68.1 percent of the total population of the area. Excluding the populations of major large cities in the area, i.e., Chicago, Indianapolis, Cleveland, Cincinnati, Detroit, Milwaukee, and St. Louis, the population of the considered territory is 27,165,900, of which 57.3 percent reside at points having pickup and delivery service by REA. On cross-examination it was developed that the Rand McNally Guide uses 1960 estimates for the States and larger cities, but uses 1950 census figures with respect to the populations of small cities and communities. Of some 2,698 points to which parcel post shipments were delivered on behalf of shippers which also use applicant's service, as shown by the 1-day (November 5, 1959) survey, 1,077 have pickup and delivery service by REA available, 644 have an REA office located thereat with no pickup or delivery, and 977 do not have either pickup or delivery available or an REA office located there. The 193 shipper witnesses supporting the application herein ship packages by parcel post to 3,480 points in the proposed territory, of which 1,135 points have pickup and delivery service by REA, 901 have an REA office but no pickup or delivery service, and 1,444 have no REA office or pickup or delivery service. With respect to 616 origin points for shipments made by applicant from and to points in the proposed territory during the week ended February 6, 1960, 496 have pickup and delivery by REA, 73 have an REA office but no pickup or delivery, and 47 have no REA office and no pickup or delivery.

Applicant's vice president asserts that its size and weight limitations have been established to assure the general trucking industry that it has no intention of encroaching upon that field. In seeking operating authority, the placing of such restrictions in the request for authority has been instrumental in inducing many of such carriers to withdraw their opposition. No regulatory agency has ever brought any violations of these limitations to the attention of this witness, and the district managers and others, since the presentation of REA's evidence, have been warned to avoid any violations of this character.

Applicant commenced operating in intrastate commerce in Wisconsin in 1955. Annual reports filed with the Public Service Commission of that State show that REA's intrastate revenue declined from $759,767 in 1955 to $559,644 in 1959 or 73.7 percent of the 1955 amount and interstate revenue in connection with operations to or from points in that State declined from $4,753,137 in 1955 to $3,519,156 in 1959 or 74 percent of the 1955 amount. During the aforementioned period applicant was competitive with REA on intrastate traffic

but not on interstate traffic. In Ohio REA's intrastate revenue increased from $2,863,630 in 1955 to $3,350,973 in 1959 or 116.8 percent of the 1955 amount despite the fact that applicant's revenue on intrastate traffic from Cincinnati, Cleveland, and Toledo increased from $388,023 to $2,995,898 during the same period.

During the week ended February 6, 1960, 5,871 of applicant's shippers in Illinois gave it an average of less than 300 pounds of freight a day, 257 gave it an average of from 300 to 1,499 pounds of freight a day, and 17 shippers gave it an average of 1,500 pounds or over a day.

With respect to REA's estimate of shipments exposed to diversion by applicant if the application herein is granted applicant introduced in evidence an exhibit showing that between some points within the territory involved herein REA's first-class rates on shipments commencing with those weighing 30 or 40 pounds are higher than truck rates on such shipments. Similarly, another exhibit shows that on shipments weighing from 1 to 100 pounds in weight the rates of buslines on express traffic from Indianapolis to Chicago are lower than REA's rates. Applicant's vice president asserts that REA is handling shipments where its charges are less than parcel post's charges on some multiple package shipments weighing less than 50 pounds and on many more weighing more than 50 pounds, which shipments would ordinarily not be subject to diversion to applicant. Shipments now handled by REA which are obtained from companies who insist on sending their traffic with the freight charges collect, which includes a large amount of REA's traffic, or those who insist on an individual bill of lading or receipt for each shipment also are not subject to such diversion. Traffic now handled by REA of shippers whose traffic requires deliveries at specified times which conform to certain train schedules, of shippers who honor consignee's routings of traffic via REA, and of shippers who have small packages moving as part of oversize shipments, also is not generally subject to diversion to applicant. Traffic involving large movements which must be delivered at specified times, such as magazines and advertising programs for new cars, on which there have been close working arrangements between the shippers and REA for a long time, also is not subject to diversion.

An exhibit submitted by applicant in its application for intrastate authority in Ohio contains an analysis of REA transit time of 1,954 shipments moving from unspecified origins in that State to Cleveland, Cincinnati, Columbus, and other unnamed cities in Ohio. It shows that on 1.9 percent of such shipments delivery was effected on the same day, on 43.2 percent delivery was effected on the next day, on 36.7 percent delivery was effected on the second day, and on 18.2 percent delivery was effected subsequent to the second day. Applicant's employees sent 37 test shipments from Detroit to Cleveland and Chicago, from Chicago to Columbus, Cleveland, St. Louis, and Indianapolis, from St. Louis to Chicago and Cincinnati, from Cincinnati to St. Louis and Cleveland, from Cleveland to St. Louis and Chicago, and from Columbus to Chicago. Of these, deliveries were effected or attempted as follows: 2 on the next day, 24 on the second day, 4 on the third day, 6 on the fourth day, and 1 on the seventh day. These computations were made from the time of pickup to the time of delivery or attempted delivery. Saturdays and Sundays were excluded from the time computed.

Because of the extremely large record in this proceeding, only the evidence viewed as most pertinent and determinative of the issues here involved has been set forth above. Other evidence deemed of lesser significance has been considered but not specifically discussed.

DISCUSSION AND CONCLUSIONS

REA on brief at the outset takes the position that its petition for consolidation of its application in No. MC–66562 (Sub-No. 1071) with that here considered for hearing and decision should have been granted and that in the absence of such consolidation it is impossible for the examiner to make a valid recommendation with respect to the granting or denial of the application, citing *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327. In that case the Federal Communications Commission granted an application filed by an applicant for authority to construct a new station at Grand Rapids, Mich., prior to the disposition of a pending application filed 2 months later by an existing operator at Muskegon, Mich., for authority to change the operating frequency of its station in such manner that the simultaneous operation of stations at both locations would result "in intolerable interference." The Supreme Court held that by statute Congress had granted applicants a right to a hearing on their applications for station licenses, and that where two bona fide applications are mutually exclusive the grant of one prior to the hearing of the other, in practical effect, deprives the latter of this right. REA refers to subsequent court cases relating to a reversal of decisions of administrative agencies[*] on the ground that such agencies failed to consider the comparative merits of mutually exclusive applications pending at the same time.

As hereinbefore indicated, REA filed its application in the aforementioned proceeding for motor common carrier authority to transport general commodities moving in express service, over irregular routes, between points in the same territory as is involved in the instant proceeding. This application was filed only 7 days prior to the commencement of the hearing in the instant proceeding and was accompanied by a petition for consolidation of the two cases for hearing and decision. The petition was denied by order of the Commission dated November 1, 1960, and a subsequent petition for reconsideration of this order and for hearing on the issue of the mutual exclusiveness of the two applications was denied on February 28, 1961.

REA's argument that the Commission erred in failing to consolidate its application with that in the instant proceeding rests solely upon its contention that the two applications are "mutually exclusive." As seen, while the territorial scope of the two applications is the same, the REA application contains none of the commodity restrictions or service restrictions included in applicant's proposal. The latter, in effect, limit the proposed operation to a specialized package delivery service, whereas REA's application practically seeks authority for a general commodity motor carrier service. The difference in the two proposals is most apparent inasmuch as only REA and three motor carriers now oppose the instant application whereas official notice of the recommended report and order of the examiner in REA's proceeding discloses that its application is opposed by the American Trucking Association, Inc., and more than 150 motor carriers. The appliaction of REA, a carrier wholly owned by railroads, also raises an important issue which is not present in the instant proceeding; namely, whether under the decisions of this Commission and the Supreme Court the unrestricted authority sought may be granted to a railroad affiliate. See *American Trucking Assns., Inc.*, v. *United States*, 364 U.S. 1. Moreover, the Interstate Commerce Commission frequently grants authorities to more than one applicant to perform overlapping services. See, for example, *Transport, Inc., Extension—Jamestown, N. Dak.*, 69 M.C.C. 667, *W. J. Digby, Inc., Common Carrier Application*, 72 M.C.C.

[*] Other than the Interstate Commerce Commission.

425, and *Everts' Commercial Transport, Inc., Extension—Richmond*, 78 M.C.C. 717. All factors considered, it is concluded that the difference in the applications was apparent on the fact thereof when the REA application was filed; that the applications of REA and applicant are not mutually exclusive in the sense in which that term is used in the *Ashbacker case, supra;* and that the failure to consolidate these proceedings does not preclude the making of a valid recommendation herein.

The need for the proposed service will be next considered. As seen, all of the 193 supporting public witnesses are users of parcel post and want to use the proposed service in lieu thereof. Evidence was adduced by such witnesses and also by stipulation as to the deficiencies which shippers experience in the utilization of this service. The record also shows the many features of applicant's proposal which are superior to parcel post service. Since all of this evidence has been set forth previously in this report and is not disputed, it need not be repeated here.

A number of exhibits introduced in evidence by applicant emphasize that REA does not afford service at many points in the considered territory. The most comprehensive analysis in this regard is that with respect to cities and communities in the proposed service area having populations shown in the Rand McNally Guide. This reveals that of 8,939 such cities and communities, 6,681, or about 75 percent, do not have an REA office or delivery service. Another study by applicant shows that 3,939 destination points in the considered territory were served by applicant under its present authorities during the week of February 20, 1960, of which 46 percent had no REA service, and an analysis of evidence adduced by the 193 shippers supporting the application shows that of the 3,480 points named as destinations for their shipments, about 42 percent had no REA office and no pickup or delivery service. Of 616 origin points for shipments transported by applicant from and to points in the proposed territory during the week ended February 6, 1960, 7.6 percent had no REA office and no pickup or delivery service. REA's analysis of parcel post packages shipped by applicant's present users shown in the 1-day (November 5, 1959) survey indicates that 98.6 percent of the packages originated at points where REA has pickup service and 91 percent were destined to points where REA has delivery service. On the other hand, a study made by applicant of the same data shows that of 2,698 points to which parcel post shipments were delivered on that day, 977 or about 36 percent, do not have pickup or delivery service or an REA office.

REA minimizes the importance of evidence with respect to points not served by it on the ground that the percentage of population served in the considered area is the real criterion as to the scope of the service afforded. In this connection, its analysis with reference to points in the considered territory to which applicant made deliveries during the week of February 20, 1960, shows that of the total population of 25,492,355 residing at such points, 3.6 percent of such persons had no REA service available; 3.3 percent had an REA office located in their communities but no pickup and delivery service available; and 93.1 percent had REA pickup and delivery service available. In the preparation of this exhibit, REA was credited with having pickup and delivery service at all cities where it affords pickup and delivery, and consideration was not given to the fact that at some points its pickup and delivery service extends to an area which is less than the corporate limits of such cities. Using population figures supplied by the Rand McNally Guide, applicant's analysis shows that of the total population of 36,375,900 residing in the considered area, only 68.1 percent of such persons have pickup and delivery service by REA. The facts that 1960 statewide

population estimates by Rand McNally were used by applicant in compiling the total population of the area, that the population figures which were set forth in that publication for the smaller cities and communities consist of 1950 census figures, and that the latter figures were used by applicant in computing the population of such smaller points served by REA, results in the showing of a lower percentage of population having REA delivery service than would be derived from a uniform usage of 1960 estimates.

From the foregoing, it is concluded that the availability of REA service throughout the territory should be determined both on a point served and population basis. While the evidence is somewhat conflicting and there are admitted minor inaccuracies in some of the statistics furnished, it is manifest that there are a large number of small cities and communities which do not enjoy any REA service and that a quite limited percentage of the total population, but nevertheless a fairly large and significant number of persons, do not have such service available. Many of the shippers supporting the proposed operation considered this to be a very definite handicap in the use of REA's service. This is due to the necessity for shippers to deliver shipments to the nearest REA stations where that carrier has no pickup service and no local office and to REA's inability to effect direct deliveries to some customers. Shippers' lack of knowledge as to the destination points at which REA's delivery service is not available also is a complicating factor. Moreover, the evidence shows that at many points where REA service is available through provision of a local office, pickup and delivery service is not afforded. Applicant's proposal to render a complete service from and to all points in the proposed territory and to pickup and deliver from the premises of shippers to the premises of consignees, is a definite element of superiority over the existing service accorded by REA.

In connection with the foregoing, the evidence indicates that REA, primarily because of the large number of joint offices with rail carriers at rail stations, has more telephone listings at which it can be contacted by shippers than applicant. While this is an REA advantage, it is largely overcome by the facts that applicant advertises and solicits widely in the proposed territory; that there are numerous points throughout such area where it can be reached for service; and that its automatic daily pickup call in a large measure obviates a need for frequent telephone contacts.

As seen, about 28 of applicant's supporting shippers evinced dissatisfaction with the amount of time required for delivery of shipments by REA. The latter introduced only one exhibit relating to transit time of freight transported. This covered movements between 7 of the largest cities[10] in the territory covered by the application, and showed that of 1,159 pieces loaded on trains or line-haul trailers on July 19, 1960, 985 were placed on delivery trucks at point of destination on the next day, 147 were similarly placed on the second day, and 27 were so placed after the second day. This evidence only related to operations between selected large cities, where the best service would be expected to be available, under conditions where the carrier's employees were alerted to the fact that a test was being conducted, and does not include the entire time elapsing between the pickup from the shipper and the delivery to the consignee. With respect to the 37 test shipments made by applicant's employees from and to the same 7 cities covered by REA's exhibit, deliveries were effected as follows: 2 on the next day, 24 on the second day, and 11 after the second day. The exhibit introduced by applicant with respect to 1,954 shipments transported by REA intrastate in Ohio shows that deliveries were made as follows: 1.9 percent on

[10] Detroit, Cleveland, Columbus, Cincinnati, Chicago, St. Louis, and Indianapolis.

the same day, 43.2 percent on the next day, 36.7 per ent on the second day, and 18.2 percent subsequent to the second day. This is significant in view of the fact that it involves operations in only one of seven States or portions of States embraced in the proposed territory. The evidence as a whole establishes that REA's service is not as expeditious as applicant's proposal to effect deliveries to points within 100 miles of the point of origin on the next day and to points in the remainder of the territory proposed to be served on a not later than second-day basis.

REA's exhibit showing an illustrative comparison of its charges with those of applicant indicates that REA's first-class charges on shipments weighing 10, 35, 50, and 100 pounds are much higher than those of applicant. Likewise the incentive rates illustrated in REA's exhibit covering shipments of certain of the commodities to which these rates apply received from one shipper and aggregating 1,500 pounds or more in 1 day, are generally higher for shipments weighing 10 and 35 pounds than those of applicant and are near the same level as applicant's charges on shipments of 50 pounds. The illustrative incentive charges are lower than applicant's on shipments of 100 pounds. However, REA's incentive rates are applicable only to certain named commodities and on some of these they apply only from designated shipping points. Its president asserts that only 8 percent of the carrier's traffic moves under such rates. As seen, REA also has minimum charges of $2.36 on some commodities and $2.57 on the remainder applicable to shipments moving from and to points in the considered territory. It is manifest from the oral evidence adduced by some of applicant's supporting shippers and from the fact that all of the 193 shippers supporting applicant, and a majority of the 79 shippers supporting REA's opposition, are parcel post users, that REA's minimum charges and high rate level presently preclude its transportation of a large volume of traffic generally within the weight and size limits of traffic proposed to be transported by applicant and which is now handled by parcel post. REA's position is that lack of volume is primarily responsible for its inability to provide a service on this traffic at rates comparable to those proposed by applicant. The evidence is not convincing, however, that REA will obtain any substantial volume of traffic now transported by parcel post. Nor is REA's contention that applicant's low charges are predicated upon a selection of the cream of the traffic by use of the same kind of restrictions as are included in its proposal substantiated by the record. Actually the evidence establishes that applicant, in its present operations, by the development and use of more efficient methods of handling and consolidation of package shipments, has been able to accord a more expeditious and economical service for traffic of the character formerly handled by parcel post than its competitors. As seen, REA is owned by the railroads and uses rail service principally for intercity transportation. In the language of the Supreme Court, "the ability of one mode of transportation to operate with a rate lower than competing types of transportation is the sort of 'inherent advantage' that Congressional policy requires the Commission to recognize." *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83. To sum up, the evidence establishes that applicant proposes to render a territorially more complete, expeditious, and lower cost service on the traffic covered by its application than that afforded by REA. A public need for such improved service is clearly evident.

REA contends that the granting of the application, through the diversion of traffic to applicant, will adversely affect the level of the rates and the service which it presently affords to the public. As seen, based principally upon sam-

pling counts, REA's research analyst expressed the opinion that it transported about 340,000 pieces a month which were exposed to such diversion. REA's assistant vice president estimates that it would lose about 85 percent of the volume exposed to diversion if the application is granted. REA's president also estimates that the granting of the application would result in the loss of about 2 million shipments a year, involving an annual net loss to that carrier of about $5 million. It is significant, however, that the assistant vice president had only been employed by REA for about 6 months prior to the date of the hearing and that his most recent prior experience and his contacts after employment with REA had been confined to shippers connected with the automotive industry. Neither the assistant vice president nor the president of REA knew the volume of traffic which that carrier transported in intrastate commerce in any part of the territory here involved or in interstate commerce from Chicago, before and after applicant commenced such operations.

The evidence of public witnesses adduced herein does not substantiate REA's estimates of diversion. In this connection, about 40 percent of the 193 shippers supporting the application do not use REA's service or use it only occasionally. Others use it for the transportation of packages exceeding applicant's weight or size limits or for the movement of commodities which because of their nature would not be forwarded in applicant's service. These include explosives, narcotics, poisons, and valuable articles. A substantial portion of the traffic obtained by REA from the 79 companies which supported its opposition moves to or is received from points outside of the proposed territory, and, therefore, is not exposed to diversion to applicant. With respect to traffic which moves solely within the considered territory, all except seven of these concerns indicated that they were not interested in applicant's proposal because of certain features in REA's service which were more suitable to their requirements. These include transportation of highly perishable freight, live animals, large volume movements in a short period of time, shipments exceeding weight or size limitations in applicant's proposal, shipments on which the freight is paid by the consignees, and high value shipments. Likewise, some of these shippers require more than one pickup a day or desire the furnishing of an express receipt for each shipment tendered. Others are influenced by the availability of local REA offices and the susceptibility of their traffic to REA's incentive rates.

REA's present average weight per shipment is about 48 pounds and its average weight per piece is about 26 pounds. Applicant's average weight per package is about 10 pounds. While it is apparent that there is an overlapping in weight and size of shipments proposed to be transported by applicant with those now transported by REA, the bulk of the traffic handled by applicant in its existing authorized service weighs much less than that moving by REA. The logical conclusion to be drawn from the evidence set forth in the preceding paragraph is that in providing a fast low-cost service, applicant has sacrificed a number of service features which are attractive to customers of REA, which factor precludes the diversion of any appreciable amount of REA traffic to applicant within the overlapping weight and size brackets. This is borne out by applicant's analysis of REA shipping records used in applicant's proceeding seeking intrastate rights in Ohio and a similar analysis in a proceeding seeking similar rights in New York State, previously discussed herein. These showed that REA transported as high a percentage of shipments in the 1 to 50 pounds bracket from and to points where applicant rendered service on this traffic as from and to points where it did not render such service. Actually a division of traffic be-

tween a low-cost service and the more varied service of REA in the proposed territory already has been accomplished by parcel post. There also are some indications that REA is endeavoring to obtain more shipments in weight brackets higher than those involved herein. All factors considered, it is concluded that the proposed service will not result in any appreciable diversion of traffic from REA, and that the advantage of the proposed service outweigh in importance any adverse effects which may result from a limited diversion of traffic from that carrier.

The authority of the opposing motor carriers has been previously set forth and need not be repeated here. Of these, Orscheln Bros., has minimum charges applicable to the handling of shipments weighing 100 pounds or less and its rates admittedly are much higher than applicant's on shipments weighing from 1 to 50 pounds. This carrier transports from 1,800 to 2,200 shipments a day, but its exhibit, listing shipments handled during a representative 5-day period, shows that only 40 shipments, or an average of 8 a day, weighed less than 50 pounds. This exhibit does not include shipments moving by Orscheln Bros., from St. Louis, from which about 50 percent of its interstate freight originates. Tucker also has minimum charges on shipments weighing less than 100 pounds. Its exhibit shows that only 39 shipments weighing 100 pounds or less were transported on 3 representative days in March 1960. The revenue derived therefrom amounted to $31.12 a day. Tucker's operating revenue in 1959 was $1,600,000. Elfrink, which appeared in support of the protest filed by Tucker, was only interested in the application insofar as it might affect traffic which it now transports between St. Louis and Cape Girardeau. The evidence of the aforementioned carriers clearly shows that their revenue from traffic which would be exposed to diversion by applicant is an insignificant portion of that received from their overall operations. Their operations include a very limited number of the points proposed to be served by applicant, and they are not able to render the complete service, territorially and otherwise, proposed by applicant. Their opposition does not warrant a denial of any portion of the application.

Sloan's is engaged in the household moving and storage business, general hauling, and parcel delivery service. In 1959 this carrier had operating revenues of $948,592, of which about 50 percent was obtained from its parcel delivery business. A survey during a 10-day period from June 20 through July 1, 1960, disclosed that 25,878 packages were transported in both intrastate and interstate commerce, of which only 3,594, or about 14 percent of all packages surveyed, were transported in interstate commerce in the wholesale type of service proposed herein. Only a very small part of Sloan's overall traffic is exposed to diversion to applicant, and such exposure is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce and in the St. Louis commercial zone. As seen, even with the authority recently granted, this carrier can only transport packages between St. Louis, on the one hand, and, on the other, very limited areas in Missouri and Illinois. Because of the territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed. All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application. Compare *United Parcel Service of New York, Inc., Com. Car Applic.*, 79 M.C.C. 629, at page 653.

REA on brief urges that restrictions imposed by applicant cannot feasibly be administered and that applicant must demonstrate a willingness and ability

to comply with them before it can receive a grant of authority herein. Protestant takes the position that the restrictions against transportation of packages exceeding 108 inches in length and girth combined or of packages weighing in the aggregate more than 100 pounds from one consignor at one location to one consignee at one location on a given day cannot be enforced. It takes the same position with respect to the proposed restrictive provision that each package shall be considered as a separate shipment. The first and last restrictions referred to have been considered and imposed in three proceedings involving applicant or its affiliate; i.e., *United Parcel Service, Inc., Common Carrier Application* 68 M.C.C. 199, *United Parcel Service of New York, Inc., Com. Car. Applic., supra*, and No. MC-115495 (Sub-No. 2), *United Parcel Service, Inc., Ext.—Arizona and California*,[11] 83 M.C.C. 810 (not printed in full), decided May 17, 1960. The remaining restriction has been imposed in the *New York* case. They have been included in applications or amendments thereto filed by United Parcel Service companies to prevent encroachment of their operations in the general trucking field and thereby to eliminate the opposition of carriers engaged therein. No evidence is presented to substantiate REA's position and there is no basis for reaching any conclusion with respect thereto differing from those in the cited proceedings.

REA also contends that the restrictions against the rendition of service (1) between department stores, specialty shops, and retail stores and the branches or warehouses of such stores, or (2) between department stores, specialty shops, and retail stores or the branches or warehouses thereof, on the one hand, and, on the other, the premises of the customers of such stores, cannot be properly administered. Reference is made to the willingness of applicant's employees to provide service for the Angola Dress Shop, a retail store. The details with respect to this matter previously have been set forth and need not be repeated here. The evidence shows that the witness represented her proposed shipments as wholesale in character, and thus might have mislead applicant's employees with respect to the nature of her business. Admittedly the billing of the witness as the Angola Dress Company indicates some doubt on the part of applicant's employee as to the status of her business. Similarly REA refers to the fact that of seven overweight shipments tendered by its special agents to applicant, five weighing over 50 pounds were accepted by applicant's drivers. The evidence shows that one of these shipments weighted 52 pounds, one weighed 54 pounds, and three weighed 53 pounds. On two, the pickup sheets were changed by the special agent, at the driver's suggestion, to show the weights as 50 pounds. On one of these shipments the driver was advised that the 53-pound weight was in the nature of an estimated weight. The Commission, division 1, in the *Chicago* and *New York* cases imposed both the retail store and 50-pound restrictions and also imposed the latter in the *California* case. It is apparent that applicant's employee was not diligent with reference to insuring compliance with the retail store limitation and that applicant's drivers were delinquent in failing to enforce the 50-pound weight restriction. It is noted that applicant's vice president had no knowledge of any complaints from regulatory agencies with respect to infractions of this sort, and that prior to the close of the hearing applicant warned its district managers and others to prevent the occurrence of any others. Like others previously considered, the 50-pound weight restriction was included in the application to prevent encroachment of the proposed operations into the general trucking field and to eliminate opposition by carriers en-

[11] Hereinafter, for convenience, referred to as the *Chicago* case, *New York* case, and *California* case, respectively.

gaged therein. While the aforementioned violations are not to be condoned, they fall short of establishing that the two considered restrictions cannot be satisfactorily administered or that applicant is unfit to conduct the proposed operation.

REA strongly urges that applicant's $2 per week charge for daily pickup service results in discrimination against infrequent shippers, particularly individuals desiring to make shipments from their residences. The evidence herein shows that in most instances involved in REA's investigation applicant's employees evinced a willingness to pick up and transport individual shipments from private residences upon payment of the weekly service charge. In a limited number there was a refusal to do so and in a few others such shippers were discouraged from using applicant. It is noted that, although applicant rarely receives requests for one-package shipments, specific instructions now have been issued to applicant's employees to eliminate any misunderstanding as to its holding out to serve shippers in this category. REA's contention in this regard was pressed in the *New York* case and was held not to be grounds for denial of the application. It also was considered not to be a proper basis for reversing the Commission's decision in the *Chicago* case by the district court in *Railway Exp. Agency, Inc.*, v. *United States*, 153 F. Supp. 738, affirmed *per curiam* by the United States Supreme Court, 355 U.S. 270. There is no showing that REA has challenged the tariff covering this charge in an appropriate rate proceeding. There also is no evidence of unwillingness on the part of applicant to accept shipments brought into its offices to avoid the service charge. In this respect, it makes available to such shippers a service comparable to that of REA at points where the latter has no pickup and delivery service. The fact that the proposed service may be more attractive to certain shippers than to others affords no real basis for denial of the application.

REA also argues that the proposed service is regular route in character; that there is no evidence as to which regular routes should be authorized; and that accordingly the application should be denied. In this connection, REA asserts that the proposed operation conforms to the criteria prescribed in *Transportation Activities, Brady Transfer & Storage Co.*,[12] 47 M.C.C. 23, as indicative of regular route service. In this regard it urges that applicant proposes to transport less-than-truckload freight for numerous shippers; that its numerous operating centers and hubs are the equivalent of fixed terminals and call stations; that its proposed daily pickup calls on shippers and daily operations between operating centers and hubs, and between hubs denote operations according to a predetermined plan and periodicity of service; that contemplated next-day or second-day deliveries involve the equivalent of schedules; and that applicant engages in intense solicitation. Protestant asserts that a large proportion of applicant's traffic moves from and to the larger cities in the proposed territory and that this also is indicative of regular route service. There is no doubt that applicant's operations have characteristics of regular route service. However, in the *Brady* case, *supra*, the Commission, division 5, at page 49, said:

> In other words, a bona fide irregular route carrier may under conceivable circumstances do many things suggestive or indicative of a regular route, even a combination of them, without unlawfully converting its operation into one over regular routes. But each of such practices is none the less suggestive of a regular route service and when, as here, the number of such practices indulged in is substantial, and *when they are not explained or justified by any special circumstances*, they cumulate and compel the conclusion that conversion to a regular route operation has been accomplished. [Emphasis supplied.]

[12] Hereinafter referred to as the *Brady* case.

At page 52, it was further stated:

We are, however, reluctantly compelled to the conclusion that it is impossible in this case, or in any other, to lay down a general rule by which the regular or irregular route character of all operations can be determined. Too much depends upon the peculiar characteristics of each considered operation and upon the surrounding circumstances. *We are convinced that each must be judged on its own particular facts. In our review of the various tests, we have hypothesized operations characterized by practices which, though ordinarily very significant, were completely outweighed by other unusual circumstances. When this can be done, no general rule can be framed to fit all cases.* [Emphasis supplied.]

At page 39, the purpose of enforcing the distinction between regular and irregular route operations was stated as follows:

In a sense, regular-route operations are restricted territorially and limited to the use of specified highways. Over those highways, however, they are permitted, and expected, to render a type of service not permitted to irregular route carriers. In contrast, irregular-route carriers are not restricted territorially, except, generally, to certain boundaries. Within these boundaries of their authority, they may reach over any convenient route or routes any authorized point. But though freer territorially than regular route carriers, they are restricted in other respects, namely, in the character of the service which they may render. It is imperative that they be so limited if, consistently with the national transportation policy, *regular route operators, between points between which ample regular route service is already being furnished, are to be protected from destructive competitive competition.* [Emphasis supplied.]

Here it is clear that there are factors which constitute special circumstances within the meaning of the *Brady case, supra.* In this connection, the service which applicant proposes extends between all points in the proposed territory and its overall character is territorial. The mere fact that it will be necessary for applicant to regularly use certain highways between operating centers and hubs and between hubs on a daily basis in order to provide efficient, expeditious, and economical handling of the particular type of freight here involved does not change the basic character of the service offered to the public. Moreover, the reason for requiring irregular route carriers having more than the usual number of regular route characteristics to obtain regular route authority or else alter the nature of their operations is, as stated, for the protection of the regular route motor carriers. Here there is no opposition by regular route carriers, except Orscheln Bros. and Tucker, because of the restrictions voluntarily incorporated in applicant's proposal. As seen, neither of the excepted carriers will be affected to any appreciable extent by a grant herein to applicant. In the circumstances, it is concluded that there are special or unusual factors in the proposed operation which outweigh in importance the presence of a number of regular route characteristics, and that the evidence clearly shows that the proposed operation, considered in its entirety, is essentially an irregular route service. This conforms to the action of the Commission, division 1, in the *Chicago, New York,* and *California* cases in granting irregular route authority for the same type of operation. Compare also *Overnite Transp. Co. Ext.—Conversion to Regular Routes,* 79 M.C.C. 231.

REA also asserts that the support of applicant's proposal by shippers appearing on its behalf is predicated upon its proposed low rate level and that it has failed to sustain its burden of proving that the level of charges which it intends to inaugurate can be maintained. As stated, applicant's proposal

contemplates the provision of service at charges comparable to those of parcel post. A detailed analysis of REA's criticism of cost data presented by applicant would require discussion more extended than is warranted in an application proceeding. However, applicant's per package cost estimate for pickup of 6.2 cents is protestant's principal target, representing a reduction in the cost of 8.3 cents experienced in the presently authorized operations. The evidence shows that the estimated reduction in pickup cost is predicated primarily upon applicant's anticipation that additional packages obtained from a grant of authority herein will be received from customers presently using the intrastate service provided by it or its affiliates and the conclusion that the new anticipated volume of packages moving in interstate commerce superimposed upon the present volume moving in intrastate commerce will increase the number of packages picked up at each stop, resulting in a decrease in the per package cost per stop. REA, however, challenges this cost estimate on the grounds that during the period from 1955 to 1959 the number of packages in the involved territory handled by applicant and its affiliates per pickup stop declined from 10.48 to 7.79 per stop. On rebuttal, applicant points out that its operations and those of its affiliates in the proposed territory during the 1955–59 period were subject to continual expansion as grants of authority intrastate within the considered States, and interstate from Chicago, were obtained. The increased number of packages during this period, therefore, were from new customers, involving in each instance an increase in the number of stops. On the other hand, as stated, in the proposed operation applicant anticipates mainly an increase in the number of packages from customers now served in intrastate commerce. It is logical that this would be the primary source of applicant's new traffic, particularly at the outset of its interstate operations. While it is also likely that applicant will obtain some traffic from new customers, particularly as the operation matures, it is doubtful that this will materially affect its ability to operate at charges comparable to those of parcel post. In this connection, it is noted that applicant's per package costs for pickup and delivery are those least affected by the proposed operation in interstate commerce, and that substantially increased costs per package have been estimated by applicant for its transfer and central sorting functions. The latter are the costs principally affected, because of the longer distance and increased handling involved in the transportation of packages in interstate commerce. Moreover, REA's exhibit discloses that applicant's proposed charges from and to points selected by this protestant are lower than those of parcel post, thus giving applicant room for adjustment of its charges, if necessary, because of a possible miscalculation of estimated costs. The fact that applicant and its affiliates have maintained rates comparable to those of parcel post in their presently authorized operations also is a significant indication of applicant's ability to do so in the future. Furthermore the many advantages afforded by applicant's proposed operation over parcel post service constitutes an effective inducement for use by shippers even at rates higher than the parcel post level. This contention is not meritorious.

There remains for consideration the question as to whether under section 210 of the act the permits held by applicant and its affiliates and the certificates sought in this proceeding may be held consistently with the public interest and the national transportation policy. The contract carrier operations of applicant's affiliates in interstate commerce are not conducted in the territory embraced in this application, and this matter need not be further considered. The contract carrier authority held by applicant and the operations performed there-

under have been set forth previously in this report and need not be repeated here. On brief, applicant urges that, except for the handling of deliveries of new furniture and household furnishings to southern Indiana for the six Cincinnati stores served in this movement, there would be no dual operations problem involved in this case. This is not so. The 50 retail department stores in Cincinnati for which applicant delivers merchandise in Kentucky beyond the Cincinnati commercial zone are located within the same territory as is proposed to be served herein and are a factor to consider in connection with the dual operations problem. Actually the situation here, except for the lower volume of traffic which it is estimated will move to the Cincinnati retail stores, is identical with that considered in the *New York* case where a restriction was imposed to prevent service on behalf of retail stores which might be served in both the considered common and contract carrier service. In both this case and the *New York* case the shippers would prepay the freight charges, thereby eliminating privity between receiving retail stores and applicant in the wholesale operation. Nevertheless, applicant can, on its own volition, alter this arrangement at any time. Moreover, as pointed out in the *New York* case, it is possible that some consignees, even in the absence of privity of contract with applicant, may still be able to control shipments moving in the wholesale service. Here, as in the *New York* case, applicant estimates that about 1 percent of its deliveries will be made to retail stores served under its contract carrier authority. While the estimated volume of such traffic at the commencement of the operation is much less than that involved in the *New York* case, such volume will increase as the operation matures. In any event, the purpose of section 210 is to prevent the opportunity for discrimination and this may be readily accomplished by imposing the same restriction against serving retail stores under contract with applicant as was imposed in the *New York* case. Applicant admits that the effect of this restriction upon its volume of traffic will be slight, and imposition thereof will insure the fulfillment of the Commission's statutory obligation. In accordance with the Commission's policy, a reservation of the right to impose terms, conditions, and limitations in the future to insure that the dual operations will remain consistent with the public interest and the national transportation policy will also be included in the findings.

The examiner finds that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of general commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, between the points, and in the manner and subject to the restrictions described in appendix A hereto, and subject to the following additional restriction and condition: (1). That no delivery service shall be provided under the authority granted herein to the premises of persons who or which have entered into contracts with applicant and are served by it pursuant to permits issued by the Commission, and (2) that the certificate granted herein shall be subject to the right of the Commission, which is hereby expressly reserved, to impose such terms, conditions, or limitations in the future as it may find necessary in order to insure that applicant's operations shall conform to the provisions of section 210 of the Interstate Commerce Act.

The examiner further finds that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the act and the Commission's rules and regulations thereunder; that an appropriate certificate

should be issued; that the application in all other respects should be denied; and that the holding by applicant of the certificate herein granted and the holding by it and its affiliates of the permits heretofore issued to them, will be consistent with the public interest and the national transportation policy.

APPENDIX A

Territory sought

Between all points in a territory comprised of the following States or portions thereof as follows: Illinois, Indiana, Ohio; that portion of Michigan within an area described as follows: From Detroit north along the Michigan State line to Port Huron, thence westerly along Michigan Highway 21 to Davison; thence northerly along Michigan Highway 15 to Bay City; thence westerly along Michigan Highway 20 to Mount Pleasant; thence southerly along U.S. Highway 27 to U.S. Highway 27 (alternate); thence southerly along U.S. Highway 27 (alternate) to Alma; thence easterly along U.S. Highway 27 (alternate) to U.S. Highway 27; thence southerly along U.S. Highway 27 to Ola; thence westerly along Michigan Highway 57 to the eastern boundary of Kent County; thence along the eastern and northern boundaries of Kent County to the northern boundary of Muskegon County; thence along the northern and eastern boundaries of Muskegon County (including all of Kent and Muskegon Counties) to Lake Michigan; thence southerly along the Michigan State line to the Indiana State line; thence easterly along the Michigan State line to Lake Erie; and thence northerly along the Michigan State line to Detroit; that portion of Wisconsin within an area described as follows: Beginning at the Illinois-Wisconsin State line at Lake Michigan and extending northerly along the shore of Lake Michigan to and including Two Rivers; thence northerly on Wisconsin Highway 147 to U.S. Highway 141; thence northerly on U.S. Highway 141 to and including Green Bay; thence southerly on U.S. Highway 41 to the northern boundary of Fond du Lac County; thence westerly and southerly along the northern and western boundaries of Fond du Lac County to the northern boundary of Dodge County; thence westerly and southerly along the northern and western boundaries of Dodge County to U.S. Highway 151; thence southwesterly on U.S. Highway 151 to the northern boundary of Dane County; thence along the northern, western, and southern boundaries of Dane County to the western boundary of Rock County; thence southerly along the western boundary of Rock County to the Wisconsin-Illinois State line; and thence easterly along such line to Lake Michigan; that portion of Missouri within an area described as follows: From St. Louis northwesterly along the Mississippi River to Hannibal, Mo.; thence northerly along Missouri Highway 168 to U.S. Highway 24–61; thence southerly along U.S. Highway 24–61 to U.S. Highway 36; thence easterly along U.S. Highway 36 to U.S. Highway 61; thence southerly along U.S. Highway 61 to Missouri Highway 19; thence southwesterly and southerly along Missouri Highway 19 to U. S. Highway 54; thence westerly along U.S. Highway 54 to Missouri Highway 22; thence westerly along Missouri Highway 22 to U.S. Highway 63; thence northerly along U.S. Highway 63 to U.S. Highway 24; thence westerly along U.S. Highway 24 to Missouri Highway 3; thence southerly along Missouri Highway 3 to Missouri Highway 240; thence southerly along Missouri Highway 240 to the Missouri River; thence southeasterly along the Missouri River to Jefferson City; thence southeasterly along U.S. Highway 63 to Rolla; thence easterly along U.S. Highway 63 to U.S. Highway 66; thence easterly along U.S. Highway 66 to Missouri Highway 68; thence southerly along Missouri Highway 68 to Missouri Highway 8; thence easterly along Missouri Highway 8 to Missouri

Highway 21; thence southerly along Missouri Highway 21 to Missouri Highway 72; thence southeasterly along Missouri Highway 72 to the Mississippi River; thence northwesterly along the Mississippi River to the point of beginning; and Davenport, Clinton, and Dubuque, Iowa, including all points on the described highways and those on the described county lines which do not coincide with State lines.

Restriction:

(*a*) No service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and each package or article shall be considered as a separate and distinct shipment.

(*b*) No service shall be rendered between department stores, specialty shops, and retail stores and the branches or warehouses of such stores; or between department stores, specialty shops, and retail stores or the branches or warehouses thereof, on the one hand, and, on the other, the premises of the customer of such stores.

(*c*) No service shall be provided in the transportation of packages or articles weighing in the aggregate more than 100 pounds from one consignor at one location to one consignee at one location on any one day.

APPENDIX B

Certificate held by applicant

Irregular routes:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment.

From Chicago, Ill., to Davenport, Clinton, and Dubuque, Iowa; points in and west of Muskegon, Kent, Barry, Calhoun, and Branch Counties, Mich.; points in that part of Indiana on and north of a line beginning at the intersection of U.S. Highway 36 and the Indiana-Illinois State line and extending along U.S. Highway 36 through Indianapolis, Ind., to junction Indiana Highway 67 near Pendleton, Ind., thence along Indiana Highway 67 through Muncie, Ind., to Portland, Ind., and thence along Indiana Highway 26 to the Indiana-Ohio State line; points in that part of Illinois on, north, and east of a line beginning at the intersection of U.S. Highway 36 and the Illinois-Indiana State line and extending along U.S. Highway 36 through Decatur, Ill., to Springfield, Ill., thence along Illinois Highway 97 to Galesburg, Ill., thence along U.S. Highway 150 to Moline, Ill., and thence along the Mississippi River to the Illinois-Wisconsin State line; and points in that part of Wisconsin in and east of Rock, Dane, Dodge, and Fond Du Lac Counties, Wis.; and

Returned shipments of the above-specified commodities which carrier has previously delivered,

From the above-specified destination points to Chicago, Ill.

Restriction: The service authorized herein is subject to the following conditions:

No service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and, for the purpose of this restriction, each package or article shall be considered as a separate and distinct shipment.

No service shall be rendered between retail stores and the branches or warehouses of such stores; or between retail stores and the branches and warehouses

thereof, on the one hand, and, on the other, the premises of customers of such stores.

APPENDIX C

General commodities, except commodities of unusual value, dangerous explosives, commodities in bulk, commodities requiring special equipment, and household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, restricted to parcels not exceeding 100 pounds, each parcel to constitute a separate shipment, over irregular routes,

Between St. Louis, Mo., on the one hand, and, on the other points in that part of Illinois bounded on the west by the Mississippi River, and on the east, north and south by a line beginning at Chester, Ill., and extending along Illinois Highway 150 to junction Illinois Highway 154, thence along Illinois Highway 154 to junction U.S. Highway 51, thence along U.S. Highway 51 to junction Illinois Highway 15, thence west along Illinois Highway 15 to junction Illinois Highway 127, thence north along Illinois Highway 127 to junction U.S. Highway 50, thence east along U.S. Highway 50 to junction U.S. Highway 51, thence north along U.S. Highway 51 to Decatur, Ill., thence west along U.S. Highway 36 to Springfield, Ill., thence along combined U.S. Highways 36 and 54 to junction U.S. Highways 36 and 54, and thence along U.S. Highway 36 to the Mississippi River, including points on the indicated portions of the highways specified.

89 M.C.C.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 880.

SLOAN'S MOVING & STORAGE CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

On Appeal From the Judgment of the United States District Court for the Eastern District of Missouri, E. D.

MOTION TO AFFIRM.

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INDEX.

	Page
STATEMENT	2
ARGUMENT	6
1. The Evidence Fully Supports the Findings and Conclusion of the Commission That There Is Public Need for the Service of UPS Throughout the Entire Midwestern Area	6
2. There Is Substantial Evidence to Support the Commission's Determination That the Service of Sloan's Is Not Adequate to Meet the Need Shown Here and That Its Service Would Not Be Impaired by Granting the Certificate to UPS	10
3. The Commission's Ruling on the Legality of the Relationship Between UPS, Its Parent and Other Subsidiary Carriers Has Been Judicially Approved and the Court Below Properly Refused to Reconsider the Issue in This Action	17
CONCLUSION	23

TABLE OF CASES CITED.

	Page
American Trucking Ass'ns v. United States, 355 U. S. 141 (1957)	22
Interstate Commerce Comm'n v. Parker, 326 U. S. 60 (1945)	13
Norfolk Southern Bus Corp. v. United States, 96 F. Supp. 756 (E. D. Va. 1950), aff d, 340 U. S. 802 (1950)	13
Pan American Airways Co. v. Civil Aeronautics Bd., 121 F. 2d 810 (2d Cir. 1941)	22
Railway Express Agency, Inc. v. United States, 205 F. Supp. 831 (1962), temporary restraining order denied, 7 L. Ed. 2d 432, 82 S. Ct. 466 (1962)	2, 3, 4, 19
Railway Express Agency, Inc. v. United States, 355 U. S. 270 (1957), affirming per curiam 153 F. Supp. 738 (S. D. N. Y. 1957)	2, 16
United Parcel Service of New York, Inc., 79 M. C. C. 629 (1959)	5, 10, 16
United States v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33 (1952)	19
United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515 (1946)	17
Yale Transport Corp. v. United Parcel Service of America, Inc., Docket No. MC-F-7321	20
Yale Transport Corp. v. United States, 365 U. S. 566 (1961), affirming per curiam 185 F. Supp. 96 (S. D. N. Y. 1960)	2, 5, 10, 16, 20, 22

STATUTES CITED.

	Page
Interstate Commerce Act:	
Section 5, 49 U. S. C. § 5	5, 18, 19, 21
Section 207, 49 U. S. C. § 307	3
Section 210, 49 U. S. C. § 310	3
Revised Rules of the Supreme Court of the United States, Rule 16(1)(c)	1
28 U. S. C. § 2284	2

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 880.

SLOAN'S MOVING & STORAGE CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, E. D.

MOTION TO AFFIRM.

United Parcel Service, Inc., Intervenor-Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

STATEMENT.

This is an appeal from a final judgment entered pursuant to the unanimous opinion of a three-judge court, constituted in accordance with 28 U. S. C. § 2284. The court had refused to set aside an order of the Interstate Commerce Commission pursuant to which a certificate of public convenience and necessity has been granted to Intervenor-Appellee, United Parcel Service, Inc. (herein "UPS").

This same order of the Commission was carried to this Court on an appeal, subsequently withdrawn, from the decision of a three-judge statutory court in the Southern District of New York, reported at **Railway Express Agency, Inc. v. United States**, 205 F. Supp. 831 (1962), which is also the subject of a Memorandum Decision by Mr. Justice Harlan refusing to issue a temporary restraining order. 7 L. Ed. 2d 432, 82 S. Ct. 466 (1962).

The certificate issued by the Commission authorized UPS to extend the geographical area of its unique package delivery service which has already been fully described to this Court in two other appeals from earlier decisions by district courts, one of which involved a portion of the same territory as is included here. **Railway Express Agency, Inc. v. United States**, 355 U. S. 270 (1957), *affirming per curiam* 153 F. Supp. 738 (S. D. N. Y. 1957); **Yale Transport Corp. v. United States**, 365 U. S. 566 (1961), *affirming per curiam* 185 F. Supp. 96 (S. D. N. Y. 1960).

The instant proceeding began with the application of UPS to the Interstate Commerce Commission for a certificate to operate as a common carrier by motor vehicle of general commodities, with certain exceptions, limited to packages and articles each weighing up to 50 pounds and measuring up to 108 inches in length and girth combined,

between all points in the entire states of Illinois, Indiana, and Ohio, and in parts of Missouri, Iowa, Wisconsin, and Michigan. A significant portion of this territory was already being served by UPS in interstate commerce, and all of the area was being served in either interstate or intrastate commerce or both, when the application was filed.

After 32 days of hearings, on a record of 6391 pages and 402 exhibits, the examiner issued his report in which he recommended granting of the certificate prayed for. Thereafter, on October 27, 1961, upon consideration of the exceptions to the examiner's report, the Commission, by Division 1, issued its report and order granting to UPS the authority which is here challenged. The Commission's order, reported at 89 M. C. C. 709, affirmed and adopted the statement of facts, the conclusions and the findings of the examiner as those of the Commission.[1]

By thus adopting the examiner's report, and in accordance with the requirements of Sections 207 and 210 of the Interstate Commerce Act, 49 U. S. C. §§ 307, 310, the Commission here specifically found (89 M. C. C. 709, 746):

> —that the operation proposed by UPS was required by the public convenience and necessity; and
>
> —that UPS is fit, willing and able properly to perform the service proposed and to conform to the provisions of the Interstate Commerce Act and the requirements, rules and regulations of the Commission thereunder.

Appeals were taken from this order by Railway Express Agency, Inc. in the Southern District of New York and by appellant Sloan's in the Eastern District of Missouri. The complaint of Railway Express was dismissed by a unanimous three-judge statutory court in **Railway**

1. The examiner's report and recommended order is reported as part of the Commission's decision at 89 M. C. C. 711-749.

Express Agency, Inc. v. United States, *supra*, 205 F. Supp. 831. An appeal to this Court from that judgment was withdrawn. The judgment of the statutory court in the Eastern District of Missouri, dismissing the complaint of Sloan's, is now before this Court.

Sloan's instituted the present action in the court below on January 4, 1962, seeking to set aside and enjoin the Commission's order of October 27, 1961. In this action, Sloan's did not deny that there is an almost unlimited number of manufacturers, wholesalers and commercial shippers, generally engaged in inter-business distribution, located throughout the proposed extended territory, who were using United States parcel post as their normal transportation medium for small package shipments. Sloan's further did not challenge the Commission's finding that parcel post service falls far short of meeting the business needs of these small package shippers (89 M. C. C. 737). Finally, Sloan's did not dispute the finding that the service rendered by UPS is far superior to parcel post in substantial respects, and obviates the parcel post problems and service deficiencies of which manufacturers and other wholesalers so earnestly complain (89 M. C. C. 737).

Rather, Sloan's based its attack principally on the following contentions:

First, Sloan's made the usual attack against the Commission's exercise of its traditional fact finding function, asserting that there was not substantial evidence to support two basic findings of fact made by the Commission, namely; (a) that Sloan's service does not meet the proved need for a reasonable and practicable alternative to parcel post throughout the entire territory described above, even though Sloan's has limited interstate authority between St. Louis on the one hand, and, on the other, a small area in Missouri and Illinois; and (b) that only a very small portion of Sloan's overall traffic is exposed to diversion to UPS, which does meet that need, and such exposure

is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand the competition of UPS in areas where both companies operate (89 M. C. C. 741).

As a second and collateral attack on the order of the Commission, Sloan's argued that a control relationship has existed for over 20 years between UPS, its parent, and affiliated carriers, which has not been approved under Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5, and that such approval should have been a condition precedent to the granting of the certificate in this case. Significantly, this argument was not made before the Commission in the instant case. It was first raised by the complaint filed in the court below. However, the identical contention had been made to the Commission in an earlier case, and to the courts on review of the Commission's order there. In that proceeding, the assertion of unlawful control in the UPS corporate family was thoroughly analyzed and firmly rejected. **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 566, *affirming* **United Parcel Service of New York, Inc.**, 79 M. C. C. 629 (1959).

In the instant case, the three-judge statutory court below, in a detailed and well-reasoned opinion by Circuit Judge Van Oosterhout, reported at 208 F. Supp. 567, unanimously dismissed the complaint (J. St. 22-34), holding that:

1. The findings of fact of the examiner and the Commission with respect to public convenience and necessity were supported by substantial evidence and such findings support the Commission's order authorizing the issuance of a certificate (J. St. 28).

2. There was no unlawful control relationship in the United Parcel Service family which would affect the Commission's jurisdiction to grant a certificate to UPS (J. St. 32-33).

ARGUMENT.

The unanimous decision of the court below, approving the issuance of a certificate of public convenience and necessity to UPS after lengthy proceedings before the Commission and a full presentation before the court, is clearly correct under the provisions of the Interstate Commerce Act, the governing case law, and long established administrative practice.

1. The Evidence Fully Supports the Findings and Conclusion of the Commission That There Is Public Need for the Service of UPS Throughout the Entire Midwestern Area.

Sloan's assumes a very heavy burden when it attacks the Commission's order authorizing the issuance of a certificate of public convenience and necessity to UPS. Significantly, Sloan's does not dispute the finding that the principal medium for small package shipments prior to inauguration of UPS' service was parcel post, and that in many important respects parcel post service is unsatisfactory, inconvenient and inadequate for commercial shippers (89 M. C. C. 737). Nevertheless, Sloan's would have the Court ignore the deficiencies of parcel post and of existing carriers, and find that the 193 public witnesses who testified concerning their urgent need for the proposed service are not to be believed. Sloan's also would have the Court find, contrary to the evidence, that its service is "identical with that which United proposed" (J. St. 6), and that Sloan's limited service would in some fashion fill the proven need in this territory.

In his report, the examiner carefully analyzed the evidence of need for UPS' service, *inter alia*, as follows:

> "* * * The wholesale service [of UPS] is a common carrier service involving principally the delivery

of small packages from manufacturers, wholesalers, and distributors to their customers. This is the type of service which applicant now performs under its common carrier authority from Chicago and which it proposes to render under the certificate sought herein. * * *" (89 M. C. C. 713.)

"A comparison of the proposed operation with that of parcel post shows that the former has many service advantages over the latter [listing them]. * * *" (89 M. C. C. 718.)

"Evidence in support of the application was adduced by 193 public witnesses representing both large and small manufacturers and wholesale business establishments. The presentation of further evidence of this nature was terminated by a ruling of the examiner, in conformity with rule 1.76 of the Commission's Rules of Practice, that further evidence of this character would be cumulative. * * *" (89 M. C. C. 720.)

"All of the supporting shippers [including 23 from Missouri] now use parcel post to transport packages from their places of business to points in the considered territory. Dissatisfaction was expressed with the service provided by parcel post for a number of reasons [listing them]. * * * The shippers who had used applicant within the scope of its present authority expressed complete satisfaction with the service afforded, and all of the supporting companies asserted that applicant's service would be used to handle shipments now transported by parcel post if the application is granted. * * *" (89 M. C. C. 720-721.)

As the examiner's analysis shows, it is conclusively established in this record that shippers in all parts of this midwestern area require the type of fast, dependable, economical and efficient delivery service offered by UPS, as a

practical alternative to unsatisfactory parcel post for their interstate shipments destined to all portions of the proposed territory.

After reviewing the "extensive material evidence bearing upon public convenience and necessity", the court below affirmed the order of the Commission as follows (J. St. 28):

> "• • • Our examination of the record satisfies us that the essential findings made by the examiner and adopted by the Commission are supported by substantial evidence and that such findings support the Commission's order authorizing the certificate."

Nevertheless, in its Jurisdictional Statement, Sloan's makes many extravagant statements—without any references to the record—in a futile attempt to imply that no need for interstate service to and from Missouri points was established (*e.g.*, pp. 7, 10, 11). The record is replete with support of the Commission's findings and of the conclusion of the court below on this point. We refer briefly to some of the voluminous evidence of need for applicant's service in the very area in which Sloan's has an interstate certificate:

1. Twenty-three shippers testified to their need for UPS' service from Missouri points to points both within and beyond the area served by Sloan's in interstate commerce (Tr. 708, 1015, 1133, 1338, 1359, 1384, 1416, 1480, 1604, 1679, 1797, 1866, 1883, 2174, 2219, 2230, 2332, 2389, 2442, 2604, 2629, 2714, 2849). Most of these witnesses listed, either orally or in exhibit form, the typical points to which their package shipments would be sent by UPS throughout the proposed midwestern area, including specifically many points in southwestern Illinois—the only area authorized to be served by Sloan's from Missouri (*e.g.*, Tr. 715; Ex. 97 [Tr. 712, 719]; Ex. 115 [Tr. 1139, 1148], Ex. 123 [Tr. 1365, 137[illegible] Ex. 133 [Tr. 1613, 1620]; Ex. 137 [Tr. 1683, 1701].

2. Exhibit 83 (Tr. 350, 367) demonstrates that shippers, who were at the time of the hearings already using UPS intrastate in Missouri, sent 3,068 packages in only one day via parcel post to destinations beyond Missouri covered by this application, including the limited area in southwestern Illinois authorized to be served by Sloan's.

3. Witnesses from every portion of this territory beyond Missouri gave evidence that they shipped hundreds of parcel post packages every week to Missouri points, including those served by Sloan's. Such testimony was given by witnesses who ship from such representative points, to name only a few, as: Chicago, Belleville, Jacksonville, Springfield, Peoria, Wheaton, Odin, Kankakee and Rockford, in Illinois; Bourbon, Westville, Indianapolis, South Bend, Madison, and Salem, in Indiana; Ravenna, Fremont, Lockland, Cincinnati and North Canton, in Ohio; Lansing, Livonia, Saginaw, and Kalamazoo, in Michigan; Davenport, Iowa; and Bristol, Wisconsin (Tr. 471, 487, 500, 523, 535, 615, 754, 782, 831, 843, 1196, 1211, 1392, 1459, 1953, 2003, 2214, 2315, 2344, 2389, 2469, 2555, 2570, 2833).

4. Exhibit 83 (Tr. 350, 367) also shows that shippers in the proposed area beyond Missouri, who were using UPS at the time of the hearings, sent a total of 3,409 packages via parcel post to Missouri points on just one day.

The record leaves no room for doubt as to the strong need for UPS' service from and to Missouri points. And, as we point out below, the record is equally conclusive that Sloan's is unable to meet that need.

2. There Is Substantial Evidence to Support the Commission's Determination That the Service of Sloan's Is Not Adequate to Meet the Need Shown Here and That Its Service Would Not Be Impaired by Granting the Certificate to UPS.

The record conclusively shows that Sloan's cannot fill the demonstrated need for transportation of parcel post type shipments from all over the area involved to Missouri points (*e.g.*, Tr. 5921, 5924, 5968); cannot fill the full outbound need of even St. Louis shippers, who are the only Missouri shippers Sloan's is authorized to serve in interstate commerce (*e.g.*, Tr. 708, 1015, 1133, 1338, 1359); has not been able to satisfy the needs of witnesses appearing in this proceeding who actually have used Sloan's service (*e.g.*, Tr. 721, 1154, 1871, 2181, 2721); and has not shown an ability to attract the enormous parcel post traffic of the supporting witnesses despite their dissatisfaction with parcel post (*e.g.*, Tr. 695, 1137, 1420, 1482, 1681).

A similar finding based upon the failure of existing carriers to attract parcel post traffic, considered sufficient to justify a grant of this same type of authority to United Parcel Service in another area, was made in **United Parcel Service of New York, Inc.**, *supra*, 79 M. C. C. 629, and was upheld in **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 566. There, the Commission had said (79 M. C. C. at 652):

> "* * * The large volume of parcel post traffic in and of itself serves as an indictment of existing services in the small-package field. * * *"

From the record in the present proceeding, the Commission concluded as follows (89 M. C. C. 741):

> "* * * As seen, even with the authority recently granted, this carrier [Sloan's] can only transport pack-

ages between St. Louis, on the one hand, and, on the other, very limited areas in Missouri and Illinois. Because of the territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed. All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application. * * *"

Twenty-three public witnesses from Missouri testified in support of this application. Several of these witnesses had actually used Sloan's service and had found it unsatisfactory (Tr. 721, 1153, 1871, 2720). Deficiencies in the service of Sloan's, testified to by the shipper representatives, include the following:

1. Pickup calls are made at irregular hours or not at all (Tr. 721, 1154, 1171, 2721).

2. Automatic pickup service is refused for shippers not having packages every day (Tr. 1871).

3. Delivery service is slow and erratic (Tr. 721, 1154, 1456), and shipments arrive in poor condition (Tr. 2181).

4. Delivery is refused to out-of-the-way points, even though on Sloan's "points served" list (Tr. 723).

5. Tracing of shipments is difficult (Tr. 1154, 2181).

6. Vehicles are permitted to be operated in a "beat-up condition" and drivers are discourteous and unkempt in appearance (Tr. 1154, 1871).

Contrary to the efforts of Sloan's to deprecate these complaints of shippers, they were not "nebulous and factitious" (J. St. 7), but substantial criticisms of Sloan's service.

In addition, the record shows that Sloan's cannot provide an adequate interstate service to Missouri points (Tr. 5921). Shippers in Chicago, Indianapolis, Milwaukee, or Cincinnati, for example, having small packages destined to Missouri points, can use Sloan's only by shipping to Sloan's in St. Louis by regular freight hauler, and then having Sloan's make the local delivery. The same is true of the many public witnesses situated in the smaller communities throughout Wisconsin, Illinois, Indiana, Ohio and Michigan. For reasons made clear in the record, such service is feasible only for shippers with large volume, such as the Chicago retail mail order houses which Sloan's serves in this manner (Tr. 5924, 5968).

Another serious deficiency in Sloan's service is that it cannot meet the needs of shippers of small packages for a service outbound from St. Louis which will cover the entire midwestern commercial trading area involved in UPS' application. The 23 public witnesses from Missouri all made it clear that they need a territorial package delivery service which will cover their commercial trading area in the midwest (*e.g.*, Tr. 711, 1016, 1482, 1682). The present delivery territory served by Sloan's is narrowly circumscribed, and a recent extension adds to that area only a relatively few square miles in southwestern Illinois. Further, Sloan's is authorized to pick up shipments only in St. Louis and nowhere else in Missouri.

Since Sloan's cannot fill the need shown here, the conclusion of the Commission is clearly correct (89 M. C. C. 741).

Sloan's also disputes the finding by the Commission that only a small portion of Sloan's traffic is exposed to diversion, and that Sloan's has demonstrated an ability to withstand the competition of UPS as to this class of traffic (89 M. C. C. 741).

It is hornbook law that the Interstate Commerce Act guarantees no motor carrier a monopoly. Even if some diversion from an existing carrier were to occur, the public convenience and necessity may still require that the service proposed by an applicant be authorized.

As summarized in **Norfolk Southern Bus Corp. v. United States**, 96 F. Supp. 756, 761 (E. D. Va. 1950), *aff'd*, 340 U. S. 802 (1950), both the courts and the Commission have long recognized that:

> "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. * * * Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. * * *"

Even if this were not the law, there is no evidence whatever to support the unjustified inference which Sloan's would have the Court draw that some St. Louis carriers have "gone bankrupt" (J. St. 14), or even been subject to any measurable diversion, as a result of competing with UPS. Rather, the failure of any carrier to prove that it suffered any material loss of traffic after inauguration of the unique service of UPS in any area, logically supports the conclusion that UPS obtains substantially all of its packages from the parcel post system.

It is the duty of the Commission to find the facts, to "exercise its judgment to determine public convenience and necessity", and "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances." **Interstate Commerce Comm'n v. Parker**, 326 U. S. 60, 65 (1945). In the instant case, the Commission has precisely exercised the power vested in it by Congress.

The Commission's findings (89 M. C. C. 741) that only a very small segment of Sloan's traffic is even vulnerable to diversion to UPS, and that Sloan's has demonstrated its ability to withstand the competition of UPS are amply supported by the whole record. In fact, these findings are inescapable from a reading of the testimony of the shipper witnesses and a consideration of the evidence of Sloan's itself.

Sloan's operates interstate as a common carrier of packages from St. Louis to points in St. Louis and St. Charles Counties, Missouri, and between St. Louis, on the one hand, and, on the other, points in Illinois within a radius of about 70 miles of St. Louis (Tr. 5921; Exhibit 350 [Tr. 6035, 6036]). It also conducts an intrastate package delivery service. In addition, Sloan's, as its corporate name indicates, is in the moving and storage business, handling household goods, and it also operates trucks and trailers in general freight hauling (Tr. 5911). In 1959, moving and storage operations and general freight hauling accounted for 50% of its revenue and 50% of its profits (Tr. 6012).

In both its interstate and intrastate package delivery service, Sloan's handles deliveries for retail stores and retail mail order houses (until recently its sole package business) as well as for wholesale shippers. The president of Sloan's testified that the retail delivery business accounts for approximately 75% of the total packages handled (Tr. 6012). Because of the restriction against service for retail stores imposed on UPS' authority here, none of those packages could be subject to diversion to UPS.

A survey of all packages handled by Sloan's during the ten-day period, June 20 to July 1, 1960, inclusive, was introduced as Exhibit 346 (Tr. 5963, 6034). It showed that only 13.9% of all packages surveyed were interstate shipments from wholesale accounts delivered in the area here involved. **Thus, less than 14% of the packages transported by Sloan's could have been even theoretically subject to the possibility of diversion to UPS.**

However, the record is entirely clear that no material part of even this relatively small proportion of packages would be diverted to UPS in the new service. The evidence shows conclusively that Sloan's has proved its ability to withstand the competition of UPS. Both UPS and Sloan's began in February, 1958, their respective wholesale parcel delivery services in intrastate commerce in Missouri (Tr. 6000-01). As reflected by a comparison of Exhibit 60 (Tr. 156, 1010) and Exhibit 331 (Tr. 5917, 6034), UPS served a much larger area in Missouri than did Sloan's at the time of these hearings (Tr. 6002). In spite of the wider coverage of UPS operations, Sloan's had developed its new wholesale package delivery business (as distinguished from its older, well-established retail store delivery business) to the point where, in a test period, 2,995 of a total of 20,356 packages were handled for wholesale shippers by Sloan's intrastate and in the St. Louis commercial zone, where UPS already offered service, which was a greater percentage of wholesale packages transported in competition with UPS than Sloan's enjoyed interstate at the time Sloan's made its study of packages allegedly subject to diversion to UPS.[2]

Consequently, the record fully supports the following conclusion of the Commission (89 M. C. C. 741):

"* * * Only a very small part of Sloan's overall traffic is exposed to diversion to applicant, and such

2. Of a total of 25,878 parcels surveyed over a ten-day period, 6,589 were purportedly handled for wholesale shippers (Ex. 349 [Tr. 5982, 6034]); and of these, 3,594 were delivered in interstate commerce beyond the St. Louis commercial zone (Ex. 346 [Tr. 5963, 6034]). Consequently, 2,995 were delivered intrastate and in the commercial zone for such wholesale shippers. Of the total of 25,878 parcels surveyed, 5,522 were handled for all types of shippers in interstate service beyond the commercial zone of St. Louis, (Ex. 346). Thus, 20,356 parcels were handled intrastate and in the commercial zone, of which 2,995 or 14.7% were delivered for wholesale shippers. All of these were already subject to possible diversion by United Parcel Service, but obviously they had not been lost by Sloan's.

exposure is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce and in the St. Louis commercial zone. * * *"

The Commission's findings and conclusion on this issue in this case are identical to those of the Commission in **United Parcel Service of New York, Inc.**, *supra*, 79 M. C. C. 629, with respect to other carriers operating in another section of the country. There the Commission stated (p. 653):

> "Although the opposing carriers maintained that a grant of this application will adversely affect their operations, we are not convinced that such a result necessarily would ensue. * * * Of those carriers shown to be active in the movement of small packages, it appears that they have already demonstrated an ability to withstand the applicant's competition * * * on the same type of traffic. * * *"

The findings and conclusion of the Commission in that case were upheld by the courts. **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 56.

Sloan's argument in this respect is also similar to that rejected in 1957 in a case involving the grant to UPS of similar authority (from Chicago to all or parts of five midwestern states) on a comparable record. **Railway Express Agency, Inc. v. United States**, *supra*, 153 F. Supp. 738, *aff'd per curiam*, 355 U. S. 270.

Sloan's has elected to ignore the evidence on which the grant of the certificate was based, and therefore asks this Court to assume that the Commission did not properly weigh the voluminous evidence before it. However, the 48-page opinion of the Commission reflects a careful

and diligent study of the extensive record, and presents convincing proof of the validity of the conclusion reached by the Commission that the service proposed by UPS is required by the public convenience and necessity (89 M. C. C. 746).

Sloan's has not only ignored the findings on which the grant of the certificate was based, but it has also made the unwarranted assumption that the court below did not properly exercise its function of review. It is well settled that, where the order granting the certificate was within the Commission's statutory power, it may not be set aside unless it is clearly erroneous as a matter of law, or is not supported by any substantial evidence. **United States v. Pierce Auto Freight Lines, Inc**, 327 U. S. 515, 535-536 (1946). Sloan's does not deny that the ultimate findings required by law were explicitly made in terms of the statutory language. Furthermore, the comprehensive and careful report of the Commission clearly shows that full consideration was given to every fact made relevant by the applicable sections of the Interstate Commerce Act. The record of 6,391 pages and 402 exhibits, introduced in the course of 32 hearing days, contains ample evidence to support those findings.

The opinion below reflects an independent and diligent study by the court of the extensive record which presents convincing proof of the validity of the conclusions reached by the Commission.

3. The Commission's Ruling on the Legality of the Relationship Between UPS, Its Parent and Other Subsidiary Carriers Has Been Judicially Approved and the Court Below Properly Refused to Reconsider the Issue in This Action.

In this appeal, Sloan's seeks to set aside the grant of a certificate of public convenience and necessity. However, Sloan's devotes five pages of its Jurisdictional Statement

to an attack which is not directed against any of the findings that form the basis of the Commission's grant of the certificate. Rather, Sloan's argument is that assertedly improper control relationships exist among members of the United Parcel Service corporate family, in violation of Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5.

Sloan's asserts that United Parcel Service of America, Inc., a Delaware corporation which owns all of the stock of UPS, and the other carriers in the United Parcel Service family under the same ownership and control, should all have been parties to the instant application, and that Commission approval of the corporate control relationships involved should have been sought in connection with the application.

Sloan's contention is founded on the premise, already found by courts and the Commission to be erroneous, that certain control relationships among UPS, its affiliated carriers, and their common parent require approval under Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2),[3] and that they have not received that approval from the Commission. Sloan's argues from this assumption that the failure to secure such approval should have been a bar to issuance of the certificate to UPS in this case.

As the court below found (J. St. 32), this contention was **never properly presented to the Commission** below, either during the hearings or in the briefs to the examiner and the Commission. The statement to the contrary in Sloan's Jurisdictional Statement (p. 19) refers only to a

3. Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2), provides, *inter alia*: "(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—(i) * * * for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *."

question asked of UPS' operating witness on cross-examination as to whether or not a Section 5 application had been made by UPS' corporate parent in connection with its ownership of UPS and affiliated United Parcel Service operating companies (Tr. 993-994). Certainly, asking this question of a witness did not constitute raising the control issue, as Sloan's contends. Apparently, Railway Express did not so consider it, since the issue was not argued in its appeal from this same order of the Commission in **Railway Express Agency, Inc. v. United States**, *supra*, 205 F. Supp. 831.

The law is clear that the courts, on review of an order of the Commission, may not entertain any argument on an issue which was not raised in the proceedings before the Commission. **United States v. L. A. Tucker Truck Lines, Inc.**, 344 U. S. 33 (1952). Here, as in the **Tucker** case (p. 36), "The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits * * *." In such circumstances, the court below properly held that the unlawful control issue to the extent it goes beyond the jurisdictional issue was not properly before the Court (J. St. 33).

But, even if the merits of this contention had been properly raised before the Commission, they clearly would still be lacking in merit. The Commission and the courts have ruled in two prior proceedings that no control relationship requiring approval under Section 5 of the Interstate Commerce Act is present in the case of the United Parcel group of carriers.

Specifically, Sloan's argues that certain allegedly unlawful intercorporate relationships involving the UPS Pennsylvania and Oregon affiliates (relationships which have admittedly existed for over 20 years) should have been approved pursuant to Section 5 as a condition precedent to issuing the certificate in this case. These identical charges were directly raised by a complaint filed

with the Commission on August 25, 1959, against United Parcel Service in **Yale Transport Corp. v. United Parcel Service of America, Inc.**, Docket No. MC-F-7321. The Commission dismissed the complaint on March 3, 1960. In so doing, and later in denying reconsideration of its order dismissing the complaint, the Commission held that the very relationship between UPS and its affiliated United Parcel Service companies of which Sloan's here complains did not require Section 5 approval, and that institution of a Section 5 proceeding would be unreasonable.

Wholly independent of the Commission's action in the complaint proceeding, a three-judge statutory court in **Yale Transport Corp. v. United States**, *supra*, 185 F. Supp. 96, *aff'd per curiam*, 365 U. S. 566, considered the same claims of illegal control in the United Parcel group and found them completely without merit. That court concluded—as did the Commission in the complaint proceeding—that there was no such control relationship in the United Parcel Service family as would require approval under Section 5.

The holding by the statutory court in **Yale Transport**, *affirmed per curiam* by this Court, is pertinent here. In that case, Circuit Judge Friendly said (185 F. Supp. at 105-106):

> "The other two allegedly unlawful control situations concern operations unrelated to the areas here involved. Protestants claim that the Commission granted a 1938 application for a contract carrier permit for United Parcel Service of Pennsylvania, Inc., 10 M. C. C. 83 (1938), which thereby became a carrier for the first time, without the parent UPSA having applied for approval of control as was later held to be required when the Commission in the M. J. Hannon case, supra, adopted the rule of the Pan American case. If the Commission is concerned about this

omission understandably made a score of years ago, § 5(7) affords a remedy; but **this did not forbid the issuance of a certificate here**, even if we assume that protestants have standing to raise the question. The other alleged illegality is that in proceedings wherein the Commission allowed United Parcel Service of Portland, Oregon, to purchase the operating rights of A. J. Wiese, 37 M. C. C. 473 (1941), and approved the acquisition of control of the Portland company by United Parcel Service of America, Inc., a Nevada corporation, UPSA, which owned all of the stock of the Nevada corporation, did not join as an applicant, as United States v. Marshall Transport Co., supra, later held it should. However, the Supreme Court has said in Alleghany Corp. v. Breswick & Co., 1957, 353 U. S. 151, 171, 77 S. Ct. 763, that although the Commission may require the ultimate parent to be joined as an applicant, such joinder is not jurisdictional and lack of it does not make the Commission's grant of approval unlawful. Even if the case were otherwise, the same considerations stated in connection with the Pennsylvania company would deprive the argument of effect here." (Emphasis added.)

Sloan's, in its Jurisdictional Statement (p. 20), implicitly recognizes that this Section 5 issue has already been decided:

"* * * Concededly, the Section 5 issue was presented to the United States District Court for the Southern District of New York in *Yale Transport Corp. v. United States, supra,* and was rejected by that Court. On appeal, the United States Supreme Court affirmed the decision of the United States District Court (Mr. Justice Black 'dissenting') and a petition for a rehearing was denied by the Supreme Court [365 U. S. 566 (1961), 366 U. S. 947 (1961)]. * * *"

In a transparent effort to circumvent the clear authority of **Yale Transport**, Sloan's here contends that a single question asked in the hearings before the Commission allegedly put United Parcel Service of America, Inc. and its subsidiary carriers on notice that the grant of the application here sought would require approval under Section 5 of the control relationships existing within the United Parcel family (J. St. 20). This assertion was firmly rejected by the court below (J. St. 32). But, even assuming, *arguendo*, that the issue was properly raised, this contention, of course, presupposes the existence of an unlawful control relationship. It has already been held that no unlawful relationship exists in the United Parcel Service group of carriers. Consequently, Sloan's argument amonnts to nothing more than a repetition of the arguments made both in the **Yale Transport** court case and in the Commission complaint proceeding. These arguments have all been finally and conclusively determined by the Commission and by the three-judge court in the Southern District of New York, and that court's decision has been affirmed by this Court. All these determinations have been adverse to Sloan's position here.

Even if it be assumed, *arguendo*, that the acquisition of the certificate by UPS in this case did invoke Section 5, Sloan's contention that the certificate which was issued here should be withdrawn would still not be tenable. As Circuit Judge Friendly pointed out in the **Yale Transport** case, citing **Pan American Airways Co. v. Civil Aeronautics Bd.**, 121 F. 2d 810 (2d Cir. 1941), a certificate may issue before a control proceeding is held. See also, **American Trucking Ass'ns v. United States**, 355 U. S. 141 (1957).

But this issue does not arise here, since Sloan's allegations with respect to UPS do not present any Section 5 question in the first place. **Yale Transport Corp. v. United**

added here. Accordingly, the court below properly rejected Sloan's contention that the Commission lacked jurisdiction to issue the certificate to UPS.

CONCLUSION.

The Commission in granting the certificate to UPS, and the court in sustaining that grant, have followed long standing and well recognized precedents. In refusing to accept appellant's novel departures from accepted practices and in determining in favor of UPS each issue advanced by appellant, the Commission and the court below acted under clear and established principles of law.

We respectfully submit that appellant has not presented any substantial question for decision by this Court, and the judgment of the unanimous court below should be affirmed.

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Dated: April 29, 1963.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 880

SLOAN'S MOVING & STORAGE CO. INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

REPLY TO APPELLEES' AND INTERVENOR'S MOTIONS TO AFFIRM

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REPLY TO APPELLEES' AND INTERVENOR'S MOTIONS TO AFFIRM

This brief reply is directed to the motions to affirm.

1. Appellees' contention that the appeal presents "no substantial question" because the "determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission" (M.A. 3)* is a homily designed to foreclose inquiry into

* The symbol "M.A." refers to the motion to affirm followed by the page number. "I.M." refers to Intervenor's motion followed by a page number. Reference to the Jurisdictional Statement is identified by the Symbols "J.S.".

the Commission's decisional processes. This Court will not assume that there is a sufficient "legal and factual basis for the Commission's order" (M.A. 3) without examining the whole record [*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951); *Interstate Commerce Commission* v. *The New York, New Haven and Hartford Railroad Co., et al.*, 31 U. S. L. Week 4363 (U. S. Apr. 22, 1963)]. If the record in this case is reviewed, the Commission's order cannot be sustained even though a part of it may be said to be supported by some evidence [*Willapoint Oysters, Inc.* v. *Ewing*, 174 F. (2d) 676, 697, cert. denied 338 U. S. 860 (1949)].

Intervenor's tiresome recitation of the number of pages of the record, the large number of witnesses (whose testimony was so vague as to foreclose application of the thesis that it is the Commission's function to weigh probity and relevance) and the size of the Examiner's Report (I.M. 6, 17) does not fill the void which characterizes the challenged order. It is an ancient lesson that when the evidence supporting the Commission's order is exiguous and conflicting evidence is "so preponderant that by comparison the meager facts * * * shrink to such a comparative insignificance that they cannot be said to be substantial in the light of the entire record, a finding based upon them has not been permitted to stand" [*N. L. R. B.* v. *Falls City Creamery Co.*, 207 F. 2d 820, 826 (C. A. 8th, 1953)].

2. Appellees and Intervenor contend that a plenary review should not be entertained because the Examiner concluded first that appellant could not perform the full service proposed by Intervenor and second, since only a small part of appellant's traffic would be exposed to diversion, there would be no adverse effect (M.A. 4;

I.M. 10, 12). This sophistry assumes that the record supports the conclusions which the Examiner reached and the Commission adopted. An answer to these contentions has already been given (J.S. 11-13). The inescapable fact is that there was no evidence at all of a need for a "complete service" to specific points in the territory covered by Intervenor's application. The true facts are that: (a) there was no statement of present or anticipated volume of shipments into or out of the Missouri area served by appellant; (b) there was no description or enumeration of the points in the Missouri area to which service would be required; (c) there was no evidence as to the volume of parcels to be shipped or their dimensions or weight; (d) there were no verifiable complaints about existing service and if a complaint was registered, there was not a single, specific, identifiable case cited.

Assuming *arguendo*, that there was a need for service beyond appellant's territory, the Commission could have granted a part of the authority and excluded therefrom the territory now adequately covered by appellant and others. In hundreds, if not thousands of cases, a part of an application has been granted where the Commission has found that a particular area, embraced within the larger territory applied for, is adequately served by existing carriers. The overwhelming majority of carriers regulated under Part II of the Interstate Commerce Act have limited territorial grants and the Commission has denied applications where these territories were subject to invasion by applicants seeking authority to serve the same and additional territory.

As for the claim that appellant will not be adversely affected, the record provides a complete refutation. Appellant's *Exhibit 346*, which covered a two week period,

reflected that appellant handled a total of 25,876 packages; 5,522 of these shipments were interstate in nature and of these, 3,594 or 65% were wholesale deliveries (Tr. 5982-5983). Contrary to the appellees' claim (M.A. 4), appellant had experienced a loss of retail traffic and was obliged to rely, more and more, upon its wholesale business (Tr. 5979, 5980) but when appellant was compelled to compete with Intervenor for intrastate wholesale shipments, its overall wholesale trade declined to 25.46% (Tr. 5982, 5983) whereas, prior to the grant of competitive authority to Intervenor its wholesale business amounted to 65% (Exhibit 346 and Tr. 5983). Manifestly, whenever appellant has encountered competition from Intervenor, the more desirable wholesale business has declined so that appellant has had to rely upon the less profitable retail business.

Actually, whether the amount of traffic which is subject to diversion is large or small is irrelevant: the Commission has uniformly ruled that all segments of a carrier's traffic are vital for its stability and this is particularly true with respect to package freight which, as Intervenor's witness admitted, can only be successfully handled if a large volume is available. In these circumstances, the Commission was and is charged with the obligation to protect appellant's traffic, which it utterly failed to do in this case.

3. It is argued that even if appellant is capable of rendering the service required by the shippers, the Commission may, nevertheless, certify additional service (M.A. 4; I.M. 13). The errors of this reasoning are twofold: (a) the Commission certified additional service in this case because it held, incorrectly, that appellant was not capable of providing service; and (b) it is incorrect to say that additional service can be authorized if present

carrier facilities are adequate. The fact is that neither the appellees nor the Intervenor could identify a specific instance of inadequate service to or from the Missouri points served by appellant. Of course, Intervenor refers to so-called shipper complaints (I.M. 11) but of the hundreds of shippers served by appellant, five specious "complaints" were alleged and the record shows that: (a) one complainant (Marx & Haas Korrect Co.) was never served by appellant and there was not the slightest evidence that a complaint was actually filed (Tr. 5945); (b) another complainant (Hugo Herzberg Co.) was never served by appellant except to deliver packages received by parcel post and appellant is still serving this company in connection with parcel post traffic (Tr. 5945-5951); (c) for the third complainant, Sligo Company, appellant handled 13 parcels in 1957 and one (1) package in 1958 without complaint and there is no record of any other complaint [Sligo has not accepted appellant's offer of service because Sligo operates its own trucks (Tr. 5951-5952)]; (d) the fourth complainant was A. S. Aloe Company which appellant served from June 1958 to March 1959 and not a single complaint was ever made; indeed, Aloe's parent company continues to use appellant without complaint (Tr. 5953-5954); (e) the fifth complainant was Wash Machine Parts Company and the dispute arose because that company refused to follow the simple precautions which appellant employed for handling C.O.D. shipments (Tr. 5955). This explains Intervenor's brash statement that there was no "doubt" about the need for Intervenor's services (I.M. 9). The guiding principle is clear: a new operation will not be granted "until it has been established that existing carriers are unable or unwilling to transport properly, efficiently, and economically the available traffic." [*Southern Express, Inc. Common Carrier Application*, 62 M.C.C. 35, 45 (1953); *Law & Ingham Transportation Company, Inc. Extension—Pig Iron*, 13 Federal Carrier Cases (CCH., Par. 84,788, 1959)].

Indeed, if there was a need for additional service from and to the Missouri points served by appellant, the Intervenor's application could not have been granted because the evidence shows that shippers who supported the application made no attempt to use appellant's services and are "in no position to determine whether such carrier's service is inadequate for its needs". [*Leonard Bros. Trucking & Storage Co. Inc. Extension*, 82 M.C.C. 623 (1961); *St. Mary's Trucking Co., Inc. Extension—Michigan*, 82 M.C.C. 502 (1961)]. The Commission's "wide range discretionary authority" upon which the appellees and Intervenor relies (M.A. 5; I.M. 13, 17) does not mean that a Court must rubber-stamp arbitrary administrative findings or findings based upon palpably insubstantial evidence or which omit essential basic findings. [*United States* v. *B. & O. R. Co.*, 293 U. S. 454 (1935); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 235 (1931); *Florida* v. *United States*, 282 U. S. 194 (1931)].

A grant of new authority is not permissible unless there is persuasive proof that (a) the new service will serve a useful public purpose, responsive to a public demand or need which cannot and will not be served as well by existing carriers and (b) the applicant can serve this purpose without endangering or impairing the operations of existing carriers [*Pan American Bus Lines Operations*, 1 M. C. C 190 (1936); *C & E Trucking Corp. Extension-Whole Condensed Milk*, 72 M. C. C. 421 (1957); *Peterson Common Carrier Application*, 30 M. C. C. 10 (1941); *Clark Common Carrier Application*, 8 M. C. C. 43 (1938); *Cleveland Common Carrier Application*, 7 M. C. C. 521 (1938); *Richards Extensions*, 6 M. C. C. 80 (1938); *Coffman Common Carrier Application*, 3 M. C. C. 93 (1937); *Norton Common Carrier Application*, 1 M. C. C. 114 (1936)]. Because there was no such evidence, the

Examiner and the Commission, improperly imposed the burden of proof upon the appellant (J. S. 9), when in fact, it was Intervenor's burden to "establish by clear and convincing evidence that the available carriers cannot properly handle the traffic moving to a particular point or area and that it offers a service which would meet the needs of the public and the particular shippers involved". [*Great Southern Trucking Co. Extension—Barton Airfield, Fla.*, 63 M. C. C. 57, 65 (1959); *Monterrey Freight Forwarding Corp.—Contract Carrier Application*, 68 M. C. C. 456, 458 (1956); *Anton Vidas Contract Carrier Application*, 61 M. C. C. 439, 442-443 (1951)].

4. The Intervenor confesses that it relies upon the alleged deficiency of parcel post service to support the Commission's order (I.M. 6-7). But the relevant inquiry was not the adequacy or inadequacy of parcel post service but whether the present and future public convenience and necessity required Intervenor's proposed motor carrier service. An examination of the record references cited by Intervenor (I.M. 8) shows that the testimony did not establish inadequacy of motor carrier service.[1]

5. The appellees misunderstood appellant's so-called "concession" (M.A. 3) that adequacy of existing service is not a bar to approval of an application (J.S. 10). In this case, however, the Commission justified its grant of authority upon the alleged inadequacy of the existing service and the absence of adverse effect. Now, there being not an iota of evidence of inadequacy of service within appellant's territory (and the Examiner did not make such a finding) adequacy of service was a cardinal issue. Even if the absence of a finding of inadequacy of service will not bar the grant of operating authority, inadequacy of existing facilities is a basic element in determining public need and unless inadequacy is proved, a Certificate will not be granted [*Hudson Transit Lines, Inc.* v. *United*

[1] Indeed, there was no probative evidence of the volume of parcel post shipments moving to specific points or the frequency thereof.

States, 82 F. Supp. 153 (S. D. N. Y., 1948); *Merlin E. Naylor Extension of Operations—North Carolina*, 8 M. C. C. 673 (1938); *Petroleum Transit Corp. Common Carrier Application*, 3 M. C. C. 607 (1937); *Clifford Wean Common Carrier Application*, 2 M. C. C. 735 (1937)]. In short, the fact that a finding of inadequacy is not required, does not warrant issuance of a new Certificate when service within a given territory is adequate.

6. The appellees and Intervenor suggest that the principal issues in the case were reached in *Railway Express Agency, Inc.* v. *United States*, 205 F. Supp. 831 (S. D. N. Y., 1962) (M.A. 4) and in *Yale Transport Corp.* v. *United States*, 185 F. Supp. 96, aff'd per curiam 365 U. S. 566 (I.M. 10). To begin with, neither case involved a single carrier, like appellant, who provided concededly expert service for parcel post type of shipments at rates lower than, or comparable to, those proposed to be assessed by Intervenor and the first cited case was pursued primarily upon the Ashbacker principle [*Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327 (1945)].

7. Appellee and Intervenor claim that the issue of illegal control is not properly before this Court (M.A. 5; I.M. 19), but if it is,[2] then the appellant's contentions are without merit (M.A. 5; I.M. 20-23).

Intervenor also implies the Commission has absolved it and its affiliates from the requirement of Section 5 approval (I.M. 19-20) and that the District Court in *Yale Transport Corp.* v. *United States* [185 F. Supp. 96 (S. D. N. Y. 1960), aff'd *per curiam* 365 U. S. 566 (1961)] held that there was no control relationship (I.M. 20) but Intervenor's reliance upon past approval is unwarranted. In the *Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co.* (39 M. C. C. 271, 276), the Commission held:

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[2] The record shows that this issue was raised (J.S. 19; Tr. 468-469).

> "If we have approved applications in the past where the factual situation as to the point herein involved correspond to that which is presented herein, that would afford no basis for us to administer the statute contrary to its provisions. Our authority extends only to the administration of the statute enacted by Congress, and does not extend to the determination of a 'policy' not expressed in the statute itself."

The Commission has recognized that it cannot approve any transaction where an illegal control relationship exists [*Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 I. C. C. 546 (1945)]. The plain fact is that since the decision in *Yale Transport Corp.* v. *United States, supra*, the Intervenor and its parent and affiliates, were apprised of the unlawful control situation which it could and should have rectified and Intervenor knew, when the instant application was filed, that if an unapproved control relationship exists the Commission could not approve its application [*M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944); *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959)]. Finally, to urge that the issue is not jurisdictional (M.A. 5) misreads this Court's decision in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151 (1957).

CONCLUSION

The Motions to Affirm Should Be Denied

Respectfully submitted,

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Dated: May 21, 1963